

2006

A "Social Dimension" in European Private Law?: The Call for Setting a Progressive Agenda

Ugo Mattei

UC Hastings College of the Law, matteiu@uchastings.edu

Fernanda Nicola

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Recommended Citation

Ugo Mattei and Fernanda Nicola, *A "Social Dimension" in European Private Law?: The Call for Setting a Progressive Agenda*, 41 *New Eng. L. Rev.* 1 (2006).

Available at: http://repository.uchastings.edu/faculty_scholarship/1284

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.

ARTICLE

A “SOCIAL DIMENSION” IN EUROPEAN PRIVATE LAW?

THE CALL FOR SETTING A PROGRESSIVE AGENDA

UGO MATTEI^{*} AND FERNANDA NICOLA[†]

^{*} Alfred and Hanna Fromm Professor of International and Comparative Law, U.C. Hastings; Professore Ordinario di Diritto Civile, Università di Torino. Part of this paper has been written at the Centro Linceo Interdisciplinare Segre, Accademia Nazionale dei Lincei, Rome, where I am currently serving as a Research Associate. A lecture based on this paper has been delivered at the New England School of Law, March 2, 2006 and a talk at the Harvard Law School at the Symposium on Legal Diffusion of the Harvard International Law Journal, March, 4, 2006.

[†] Associate Professor, Washington College of the Law, American University, Adjunct Professor at New England School of Law. We wish to thank Duncan Kennedy, Mauro Bussani, Daniela Caruso, Michele Graziadei, Maria Rosaria Marella, Arnulf Becker Lorca and Anna di Robilant for ongoing conversations on this topic and their helpful comments on this work.

TABLE OF CONTENTS

INTRODUCTION...	3
I. THE EUROPEANIZATION OF PRIVATE LAW: LEGAL SOURCES, IDEOLOGY, AND PROCESS.....	4
A. Legal Sources in European Private Law.....	4
B. Technocracy at Work: What Is the Common Frame of Reference?... ..	10
C. The Ideological Divide: Neo-liberalism Versus Social Justice in European Contract Law... ..	16
D. The <i>Social Justice Manifesto</i> and the Legitimacy of the Process.....	23
E. The Scholarly Industry and Its Dark Sides... ..	26
II. SOCIAL CONTRACT LAW AND SOCIAL EUROPE, PART OF THE PROBLEM OR PART OF THE SOLUTION?.....	31
A. The “Social” Critique of Formalism in Contract Law and Its Historical Inadequacy... ..	31
B. The Critique of the Social and Its Erasure in the <i>Manifesto</i>	34
C. Social Europe: A Solution or a Competitive Hegemonic Project?... ..	37
D. Social Europe Versus Socialist Europe.....	40
III. SETTING A PROGRESSIVE AGENDA IN EUROPEAN PRIVATE LAW.....	42
A. Re-Politicizing the Process... ..	44
B. Toward a Transformative Agenda for European Private Law.....	47
C. Restructuring the Field: Constitutions and Codes... ..	50
D. Restructuring the Field: Whose Access to Justice?... ..	57
E. Diversity and Distribution: Why Should We Care?... ..	62
CONCLUSION.....	65

A philosophy of praxis cannot but present itself at the outset in a polemical and critical guise, as superseding the existing mode of thinking and existing concrete thought (the existing cultural world). First of all, therefore, it must be a criticism of “common sense”, basing itself initially, however, on common sense in order to demonstrate that “everyone” is a philosopher and that it is not a question of introducing from scratch a scientific form of thought into everyone’s individual life, but of renovating and making “critical” an already existing activity.¹

INTRODUCTION

It is difficult to introduce a reader, not privy to the current debate on European private law, to what is understood by “social dimension” within it. Indeed, the idea is quite minimal and it has been spelled out recently in “Social Justice in European Contract Law: A Manifesto”² (“*Social Justice Manifesto*” or “*Manifesto*”). In this article, a group of scholars have dedicated a few academic meetings to express the feeling that the current “technocratic” clothing of legal Europe is highly questionable; that European private law cannot be constructed as a merely technical or neutral exercise of institution building, but rather its “political dimension” should be clearly recognized; that, to the contrary, Brussels handles the European private law process as a matter strictly functional to the needs of the construction of an open market; and that what suffers in this process is “social justice.”³

While the foes of the project are clearly spelled out in the *Manifesto* as the “technocrats and bureaucrats” in Brussels, a lot of self-restraint is exercised when it comes to a self critique of the role of legal academia in the process of Europeanization of private law. In contrast, we portray as deeply problematic the many issues related to a line of scholarship now developing as a well-founded industry by the institutions in Brussels.⁴

-
1. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 330-31 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 10th prtg., Int'l Publishers 1989) (1971). One can also see the influence of Gramsci in the work of PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993).
 2. Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004) [hereinafter *Social Justice Manifesto*].
 3. See generally *id.* (discussing the meaning of a social dimension in European private law discourse).
 4. While some resource-controlling scholars are more ready to yield to a pattern of influence and prestige connected to the self-appointed role of “private legislators,”

This Article aims to show what the political, rather than the technical stakes, are in the current debate over the harmonization of private law in Europe. Part One analyzes the main actors, the legal sources, the ideological divide, and the process animating the current debate on European private law. It sheds light on the incremental transformation of European private law in a scholarly industry. Part Two sheds light on the main obstacles and inconsistencies that jurists encounter in envisioning a Social private law. This section argues that the notion of the “Social” in private law scholarship as well as the idea of “Social Europe” is rarely a useful notion to articulate a progressive agenda for European private law. Finally, Part Three offers some modest proposals of the methodological and strategic nature on the possibilities and the limitations of setting a progressive agenda for European private law. We argue that a progressive agenda for European private law can be conceived today as a significant platform only by breaking with the current hegemonies and ideologies, as well as by unveiling the transformation of European private law into a scholarly industry.

In light of Antonio Gramsci’s notion of a philosophy of praxis, we hope that this paper will spark further thoughts and self-criticism on current mainstream, progressive, and neo-liberal projects tackling the harmonization of private law in the European Union.

I. THE EUROPEANIZATION OF PRIVATE LAW: LEGAL SOURCES, IDEOLOGY, AND PROCESS

A. Legal Sources in European Private Law

It will be useful for the reader not familiar with the intricacies of EU law to offer some context in which the current issues are unfolding. Unlike the United States, the European Union did not create a system of federal courts, thus what is largely understood as European private law results from a complex interplay of harmonizing directives and national private law regimes. The process of private law harmonization encompasses a large number of legal sources and institutional actors both at the European and at the national level.⁵

others have allied with the project of resisting the European Commission agenda while coalescing around the *Social Justice Manifesto*. See, e.g., Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220, 239 (2005); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 640 (1995).

5. Sources of law also known in comparative law as legal formants primarily refer to a legislative, judicial, and scholarly source. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. I), 39 AM. J. COMP. L. 1 (1991); RODOLFO SACCO & SILVIA FERRERI, INTRODUZIONE AL DIRITTO COMPARATO (1980);

European private law comprises a variety of legal rules, which derive from legislative, judicial, and scholarly sources operating at different levels of government.⁶ The legislative source of European private law comprises both the body of EU legislation, namely directives that created a patchwork harmonization of private law rules, and national legal rules enshrined in continental Civil Codes, “which in some cases are naturally converging.”⁷ Finally, European private law also encompasses those legal provisions that transpose European directives that Member States introduced into their existing civil codes. European lawyers therefore, have plunged into this complicated scenario, in which European legal traditions encounter different legal sources as well as different levels of governments.⁸ This Article predominantly focuses on the legislative source, namely a number of directives that the European Commission has proposed to harmonize the field of European private law.⁹ The Community institutions include the European Commission, the Council of Ministers, and the European Parliament. The Commission acts both as a legislative and as an executive branch and is composed by twenty-five commissioners who are appointed for five years with the power to initiate legislative processes.¹⁰ The Council of Ministers is composed of representatives from a ministerial level of the twenty-five Member States, who can commit their government to Community policies.¹¹ The European Parliament (EP) is composed of 732 members, who are directly elected by European citizens for five-year terms.¹² Together, the Council and the EP perform as a two-house legislature adopting Community acts, which can be either regulations or directives. While regulations have general application, are binding in their entirety, and are directly applicable in all Member States, directives need to

Rodolfo Sacco, *Souvenirs d'un vieux comparatiste*, 10 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [Z. Eu. P.] 727 (2002) (F.R.G.).

6. See P.G. Monateri & Rodolfo Sacco, *Legal Formants*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 531, 531-32 (Peter Newman ed., 1998).
7. See Aurelia Colombi Ciacchi, *Editorial*, 13 EUR. REV. PRIVATE L. 281, 281-83 (2005) (discussing the late payment directive and its implementation).
8. See generally Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002) (identifying various sources of law and the problems associated with lack of unity).
9. In particular we will use as an example, a well-known Directive in European contract law: Council Directive 93/13, 1993 O.J. (L 95) 29-34 (EEC) [hereinafter Unfair Terms Directive].
10. See Treaty Establishing the European Community, Nov. 10, 1997, art. 211, 1997 O.J. (C 340) 3 [hereinafter EC Treaty] (defining the power of the Commission); see also PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 59 (3d ed. 2003).
11. See EC Treaty art. 203; see also CRAIG & DE BÚRCA, *supra* note 10, at 65.
12. EC Treaty art. 190.

be transposed into Member States' legal orders to become fully binding.¹³ Even though Member States are obliged to attain the goal set by the directive or "the result to be achieved," they maintain discretion over implementing measures.¹⁴

Under Articles 94 and 95 EC, which indicate that the goal of harmonization is the establishment and functioning of the internal market, the Community enjoys a relatively broad power to issue directives to harmonize specific private law rules.¹⁵ The main difference between these provisions is that under Article 94 EC the Council decides by unanimity after consulting the EP, whereas under Article 95 EC the Council decides by majority voting through the co-decision procedure, whereby the EP has a co-equal role.¹⁶ First introduced by the Maastricht Treaty, today the co-decision procedure or "Community Method" has become the basic Community legislative process.¹⁷ Under Article 251 EC, the co-decision procedure proceeds as follows: the Commission drafts a text, and then the Council and the EP can amend and approve the text through the adoption of a common position or the intervention of a conciliation committee. Following the approval of a directive, Member States must transpose it into their national legal systems.

In the mid-1980s, the Commission began the harmonization of private law in the realm of consumer contracts for door-to-door sales and product

13. See *id.* art. 249.

14. See *id.* Directives are distinct from classic federal legislation in that Member States can choose with some flexibility, which type of national instrument to implement in order to achieve the prescribed goal. See CRAIG & DE BÚRCA, *supra* note 10, at 114-15.

15. The term "harmonization," or approximation of the laws, was introduced in the original Treaty of Rome (1958) under Article 100 (now article 94 EC) with the goal of eliminating the distortions of competition created by the laws of the Member States. The Single European Act (1987) adopted Article 100A (now article 95 EC), which required majority voting rather than unanimity to achieve the approximation of national measures for the establishment and functioning of the common market. In contrast, moreover, under Article 95 EC the Council decides via majority voting through a co-decision procedure, as set out in Article 251 EC in which Council and EP share equal powers, which approximation measures will be adopted, where Article 94 EC requires unanimity. See Walter van Gerven, *Harmonization of Private Law: Do We Need It?*, 41 COMMON MKT. L. REV. 505, 505-06 (2004).

16. The co-decision procedure is laid down in EC Treaty art. 251.

17. See CRAIG & DE BÚRCA, *supra* note 10, at 144-47 (explaining the co-decisional procedure); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002) (using the classic "Community Method" as a basis for comparing alternative methods for governance).

liability rules.¹⁸ By the end of the 1980s, numerous consumer contract directives created a body of European private law tackling consumer policy, which was only expressly included under the competence of the Community by the Maastricht Treaty (1992).¹⁹ Even though these directives regulated consumer issues, their main goal was the establishment and functioning of the internal market, based on Article 95 EC, rather than the creation of a body of European consumer policy under Article 153 EC.²⁰

The legal scholarship source of European private law comprises publications, casebooks, or doctrinal commentaries addressing European contract and tort law.²¹ These materials enable scholars to expose the views of “*la doctrine*” to influence both national and European educational legal systems. In order to obtain greater convergence of European legal education to achieve a European common law, academics advocate for a greater role of scholarship in channelling the harmonization process.²² The focus of this Article is primarily on this source and what we will define as the scholarship industry promoted by European lawyers.

Finally, the judicial source in European private law includes the domestic courts’ jurisprudence, which interprets European directives and the growing body of jurisprudence from the European Court of Justice

-
18. See the Council Directive 85/577, 1985 O.J. (L 372) 31-33 (EEC) that protects the consumer in respect of contracts negotiated away from business premises.
 19. See EC Treaty art. 153. See generally STEPHEN WEATHERILL, EC CONSUMER LAW AND POLICY (John A. Usher ed., Eur. Law Series 1997) (describing how EC consumer policy constructed its identity in the shadow of fundamental constitutional omissions from the original treaty); Geraint G. Howells, “*Soft Law*” in *EC Consumer Law, in LAWMAKING IN THE EUROPEAN UNION* 310 (Paul Craig & Carol Harlow eds., 1998) (discussing the role of “soft law” to fill gaps in formal laws).
 20. From 1985 to 1999 the Commission agenda triggered seven Directives on European contract law. See *Commission Green Paper on European Union Consumer Protection*, at 3-4 COM (2001) 531 final (Oct. 2, 2001) [hereinafter *Consumer Protection Paper*]. The most recent European legislation in contract law is the Directive on Consumer Sales and Associated Guarantees. See Council Directive 1999/44, 1999 O.J. (L 171) 12. In the *Consumer Protection Paper*, the EC noted its intent to harmonize the disparate existing laws of the Member States to ease burdens on businesses while protecting consumers in an effort to improve the functionality of the internal consumer market. See *Consumer Protection Paper*, *supra* at section 3.
 21. See PHILLIPPE JESTAZ & CHRISTOPHE JAMIN, *LA DOCTRINE* (2004).
 22. See Walter van Gerven, *Codifying European Private Law? Yes, if . . . !*, 27 EUR. L. REV. 156 (2002); Walter van Gerven, *Bringing (Private) Laws Closer to Each Other at the European Level*, CCLE (Leuven Centre for a Common Law of Europe, Florence), Dec. 2005, <http://www.law.kuleuven.ac.be/ccle/publications.php> (follow “W. van Gerven, *Bringing (Private) Laws Closer to Each Other at the European Level*” hyperlink under “Other CCLE Related Publications”).

("ECJ"). The case law of the ECJ raises tension. This tension is well known in the United States in the domain of the general federal common law,²³ and this tension concerns the role of the ECJ in the interpretation of private law rules, traditionally interpreted by domestic courts.²⁴

The ECJ can only interpret directives via two procedural grounds. The first concerns a suit brought before the ECJ by the Commission under Article 226 EC.²⁵ The Commission polices Member States for their incorrect or late implementation of directives and has the discretion to sue those governments that are reluctant to follow its recommendations on the "correct" transposition of directives.²⁶ This procedure raises numerous problems on what should be the correct transposition of directives by those Member States with profoundly diverse legal systems and national legal traditions.²⁷

The second procedural ground allows individuals to bring actions before their national courts raising preliminary questions on the interpretation of EC law. By means of the procedure of Article 234 EC, national judges have the discretion to refer such questions to the ECJ for preliminary rulings.²⁸ This instrument has been fundamental to the effective

23. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court overturned *Swift v. Tyson*, 16 U.S. (16 Pet.) 1 (1842) by rejecting the existence of a "federal general common law." *Erie*, 304 U.S. at 78.

24. See Peter Rott, *What is the Role of the ECJ in EC Private Law? - A Comment on the ECJ Judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald*, 1 HANSE L. REV. 6, 6-7 (2005).

25. See EC Treaty art. 226.

26. See Case C-52/00, *Comm'n v. France*, 2002 E.C.R. I-3827.

27. See Case C-478/99, *Comm'n v. Sweden*, 2000 E.C.R. I-04147.

28. See EC Treaty art. 234.

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of

enforcement of the new rights and remedies granted by EC law directly to individuals and to groups.²⁹ Domestic courts have largely contributed to the expansion and application of EC law, even though their behavior varies significantly in each Member State. Jurists pointed out that within the same legal system, legal elites, who were initially reluctant to refer preliminary questions to the ECJ, later began to deploy preliminary rulings as a means for their judicial empowerment.³⁰

Scholars wrote extensively on the uniqueness of this judicial exchange between domestic and European courts, depicting it as a constitutional and participatory dialogue between national and supranational judges. Some jurists stressed how the constitutionalization of EC law has progressively empowered national courts as the “agents of the Community order” vis à vis Member States.³¹ In contrast, others highlighted that such processes vary greatly depending on the attitude of national judges in sheepishly adopting or resisting EC law and its interpretation by the ECJ.³²

In this vein, by shifting their attention from European integration towards the behavior of domestic courts and national interest groups, commentators are increasingly focusing on the preliminary reference mechanism as a unique standpoint to understand the judicial dialogue and cooperation in the EU.³³ Finally, Micklitz has openly addressed the problem of political legitimacy in conjunction with patterns of judicial cooperation in different legal fields. He has highlighted that any inquiry of judicial cooperation in the EU needs to take into account the “preparedness of the national courts to use preliminary reference procedure” as well as

Justice.

Id.

29. See CRAIG & DE BÚRCA, *supra* note 10, at 528 (discussing the legality of community measures); *id.* at 178-229 (explaining the EC doctrine of direct effect); *id.* at 397-431 (discussing the EC doctrine of state liability).
30. See P.P. Craig, *Report on the United Kingdom*, in THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 195, 220-21 (Anne-Marie Slaughter et al. eds., 1998).
31. *Id.*; Alec Stone Sweet, *Constitutional Dialogues in the European Community*, EUI WORKING PAPERS (European Univ. Inst., Florence), Dec. 1995, at 1, 22-26.
32. See LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 74 (2002); Leone Niglia, *The Non-Europeanization of Private Law*, 9 EUR. REV. PRIVATE L. 575 (2001).
33. See Paul Davies, *Transfers of Undertakings*, in LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE 131, 131-228 (Silvana Sciarra ed., 2001); Claire Kirkpatrick, *Gender Equality: A Fundamental Dialogue*, in LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE, *supra*, at 31, 41-130.

“the way in which courts react to ECJ judgments.”³⁴

B. Technocracy at Work: What Is the Common Frame of Reference?

Today, anybody pursuing the task of reading the numerous articles on European private law will encounter the notion of a “Common Frame of Reference” (CFR), which was created by the European Commission in its attempt to further harmonization, while at the same time using a tool, which would be perceived by the Member States as a less top-down form of regulation.

The Commission as a hybrid is the EC executive branch but it also retains the power of initiative over Community legislation. In setting its EC legislative agenda, the Commission’s committees are continuously consulting the Council, the EP, and other supranational bodies to determine the course of future legislative activities.³⁵ However, in response to the increasing democratic concerns raised by policy-makers and academics on the Community method, in 2001 the Commission launched an extensively advertised survey of the stakeholders who are likely to be affected by EC regulations. The Commission aimed at improving the quality and the effectiveness of Community re-regulation, while at the same time promoting soft law and new forms of governance to complement the Community method.³⁶ In the realm of European contract law the Commission consulted stakeholders and academics on whether to continue with a sectoral intervention, namely via sectoral directives and soft law instruments, or rather adopt a more comprehensive and “hard” European Civil Code.³⁷

In February 2003, the European Commission published an Action Plan aimed at achieving greater coherence in European contract law.³⁸ The Action Plan continues the ongoing debate with stakeholders and academics launched in 2001 to foster dialogue on the practical as well as technical

34. See HANS-W. MICKLITZ, *THE POLITICS OF JUDICIAL CO-OPERATION IN THE EU: SUNDAY TRADING, EQUAL TREATMENT AND GOOD FAITH* 27 (2005).

35. See Christian Joerges, “*Good Governance*” *Through Comitology?*, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* 311, 318 (Christian Joerges & Ellen Vos eds., 1999).

36. See *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (Gráinne de Búrca & Joanne Scott eds., 2006).

37. See *Communication from the Commission to the Council and the European Parliament on European Contract Law*, at 6-7, COM (2001) 398 final (Nov. 7, 2001) [hereinafter *Green Paper*].

38. *Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law - An Action Plan*, COM (2003) 68 final (Dec. 2, 2003) [hereinafter *Action Plan*].

problems arising from the divergence of national contract law regimes.³⁹ By targeting the obstacles, which prevent the smooth functioning of the internal market, the Action Plan aspired to improve the quality of Community regulation through legislative transparency and stakeholders' participation.

In the Action Plan, the Commission was careful to take further action in the field of contract law but uncertain on the tools such as hard and soft, sectoral or comprehensive measures to achieve an efficient and coherent regulation of contract law. In departing from a European codification, the Action Plan chooses to ameliorate the existent contract *acquis communautaire*,⁴⁰ by improving its coherence through both hard measures and soft ones,⁴¹ in particular through a non-binding Common Frame of Reference ("CFR").⁴² By this point it was already abundantly clear that the harmonization of contract law was the minimalist approach that the Commission could reach more easily and with less opposition than

39. See *id.* at 4; Dirk Staudenmayer, *The Commission Action Plan on European Contract Law*, 11 EUR. REV. PRIVATE L. 113, 113-27 (2003).

40. The *acquis communautaire* is the result of the body of Directives, mostly harmonizing consumer contracts and product liability and their common interpretation, by the ECJ that constitutes the core of European private law. See Reiner Schulze, *The Acquis Communautaire and the Development of European Contract Law*, in *INFORMATIONSPFLICHTEN UND VERTRAGSSCHLUSS IM ACQUIS COMMUNAUTAIRE: INFORMATION REQUIREMENTS AND FORMATION OF CONTRACT IN THE ACQUIS COMMUNAUTAIRE* 15 (Reiner Schulze et al. eds., 2003) (explaining the development of a European contract *acquis*).

41. In the field of European private law, the Commission has used legislation adopted through the Community method or "hard law" to harmonize European private law. These hard measures (directives, regulations) are enforced by national and European courts and they are mandatory as well as binding tools of regulation. However, in response to the increasing democratic concerns regarding the Community method, in 2001 the Commission launched an extensive inquiry to improve the quality and the effectiveness of Community re-regulation and at the same time promote soft law and new forms of governance to complement the Community method. Soft law measures are not fully binding, they are voluntary and they can, according to some scholars, achieve better goals by departing from a command and control strategy. See Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE*, *supra* note 36, at 2-4; David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L.J. 343 (2005).

42. See *Action Plan*, *supra* note 38, paras. 75-77 (addressing consolidation, codification and the existing instruments as possible means to achieve greater coherence). "Codification means the adoption of a new legal instrument which brings together in a single text, *but without changing the substance, a previous instrument* and its successive amendments, with the new instrument replacing the old one and repealing it." *Id.* at 20 n.56 (emphasis added).

undertaking fields such as property or family law.⁴³

Similar to the United States Restatement of Contracts, the CFR aims to increase the coherence of the contract law *acquis* and to achieve the uniform application of directives. But the language of the Commission carefully avoids the term “code” while adopting the softer notion of CFR. This still obscure tool should provide common principles, terminology, and rules for contract law to address gaps, conflicts, and ambiguities emerging from the application of European contract law.⁴⁴

According to the Commission, the non-uniform implementation of directives by Member States leads to inconsistencies and fragmentation of contract regimes, creating different legal rules for the same commercial situation.⁴⁵ The Commission maintains that a non-uniform application of contract rules entails high transaction costs, burdening both industries and “active” consumers in search of precious information.⁴⁶ High transaction costs emerge not only in the phase of formation of cross-border contracts, but also through judicial control over the fairness of contractual terms.⁴⁷ In order to achieve greater coherence in the application of European contract law and consequently reduce transaction costs, the Commission’s strictly functionalist approach is to improve the quality of the existing *acquis communautaire*. In short, the Action Plan reinforces the view that the existence of different contract law regimes creates a barrier to trade for cross-border transactions within the internal market, thus coherence means more efficient outcomes, which can be reached through better uniformity in implementation and maximal harmonization.⁴⁸

43. See generally Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751 (2004) (discussing European property law); Maria Rosaria Marella, *The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law*, 12 EUR. L.J. 78 (2006) (discussing European family law).

44. See *Action Plan*, *supra* note 38, Executive Summary, at 2 (“[T]he Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules . . .”).

45. See *id.* paras. 16-24, 57; Rodolfo Sacco, *Langues et droit*, in LES MULTIPLES LANGUES DU DROIT EUROPÉEN UNIFORME 163, 163-85 (Rodolfo Sacco & Luca Castellani eds., 1999).

46. See *Action Plan*, *supra* note 38, paras. 25-51.

47. *Id.* paras. 34-39. For example, more information is necessary for different national mandatory rules limiting or excluding contractual liability. See *id.*

48. *Id.* para. 57. “An improved EC *acquis* should enhance the uniform application of Community law as well as facilitate the smooth functioning of cross-border

In response to the Action Plan, the European Parliament, traditionally proactive in matters of private law codification and having endorsed this idea since the late 1980s, also recognized the need for further harmonization in order to facilitate cross-border transactions within the internal market.⁴⁹ Even though the European Parliament offered its political guidance to drive further Europeanization of contract law, it warned the Commission not to overstep the boundaries of Community competences.⁵⁰ Article 5 EC, stating the principle of attributed competences of the Community, is the major concern of supranational institutions. In response, the Commission increasingly argued that via greater coherence in the *acquis*, through maximal harmonization and less differentiation, European contract law would serve the goal of eliminating obstacles to integration, rather than creating new ones.

In drafting the Action Plan the Commission technocrats emphasized that the CFR would eliminate market inefficiencies arising from the diverse implementation of European directives, ensuring greater coherence in their interpretation by courts. According to the Commission, the CFR should provide jurists with a solution to the costly problem of the non-uniform interpretation of European contract law due to vague terms and rules.⁵¹ In 2004, the Commission was confident that the CFR would improve the coherence of the existing and future *acquis*.⁵²

According to one of the Commission's follow-ups to the Action Plan, inconsistencies in European contract law are triggered by vague legal

transactions and, thereby, the completion of the internal market." *Id.*

49. See Report on the Communication from the Commission to the European Parliament and the Council—A More Coherent European Contract Law—an Action Plan, EUR. PARL. DOC. (COM A5-0256/2003) (2003), *prepared by* Klaus-Heiner Lehne. Here the EP argues that new harmonizing directives on contract law should be based on EC Treaty art. 95 and, in the aftermath of the tobacco advertising judgement, it should have as a primary goal the achievement and functioning of the internal market. *Id.*

50. See Staudenmayer, *supra* note 39, at 116-17.

51. See *Action Plan*, *supra* note 38, para. 18.

52. See *Communication from the Commission to the European Parliament and the Council – European Contract Law and the Revision of the Acquis: The Way Forward*, § 1, COM (2004) 651 final (Nov. 10, 2004) [hereinafter *The Way Forward*].

[T]he Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the *acquis*. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States' legal orders.

Id. § 2.1.1 (internal citations omitted).

concepts introduced by the directives.⁵³ In particular, two types of problems arise when the directives contain vague terminology. First, directives adopt “broadly defined” legal concepts, therefore leaving too much discretion in their implementation to national legislators or judges.⁵⁴ Second, directives introduce legal concepts that are “alien to the existing national legislation,” thus providing puzzlement and leeway for new statutory interpretations by courts.⁵⁵ Thus, when judges face vague terms, they can either interpret them by referring to the broad principles of the *acquis communautaire*, or they can refer to the particular goals of the directive in question. While the latter interpretation is problematic because it leads to high “fragmentation of national legislation,” according to the Commission the former interpretation will promote greater coherence in European contract law.⁵⁶

As an example, the Commission openly referred to the *Leitner* judgement as a problematic case because the ECJ followed the substance but not the formal reasoning deployed by Advocate General (“A.G.”) Tizzano in interpreting the notion of damage enshrined in Article 4 of the Directive. The A.G. suggested that the notion of damage should be interpreted in light of the *acquis communautaire* by referring to other European directives and precedents, whereas the ECJ decided to interpret the notion of damage in connection with the limited purpose of the Package Holiday Directive.⁵⁷ In doing so, the Court was not constrained from the *acquis communautaire*, but it interpreted the notion of damage in light of the particular circumstances of the case. The concern raised by the Commission was that the wide interpretive discretion of the ECJ might conflict with the goal of the Community decision maker in regulating the single market, thus undermining the legitimacy of EU law.

Recently the Commission has openly selected two legal instruments to achieve greater coherence in European contract law. In October 2004, the Commission committed to a maximal level of harmonization as a

53. *Id.* § 2.1.1 (summarizing the four problems addressed by the action plan: (1) the use of abstract terms; (2) application of directives; (3) differences between national implementing laws; and, (4) inconsistencies in EC contract law legislation).

54. *Action Plan*, *supra* note 38, para. 19; see Council Directive 90/314, Package Travel Directive, 1990 O.J. (L 158) 59-64 (EEC). This was the option taken by Advocate General Tizzano in *Leitner* but the court did not follow suit. In that case, the court preferred to interpret the notion of damage in light of a mere textualist reading of the Package Travel Directive. See Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631.

55. *Action Plan*, *supra* note 38, paras. 17-21 (addressing the ECJ judgments *Travel-Vac* and *Leitner*).

56. *Id.* para. 21.

57. Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631.

means to avoid fragmentation and incoherencies triggered by minimum harmonization rule making in the implementation of directives. Moreover, the CFR aims to provide both European and national judges with uniform principles for interpreting European contract law, as a remedy to the diverse interpretation by domestic courts.⁵⁸ The institutionalization of the CFR is developing day by day and it can be monitored on the Commission website where the names of the new appointees from the Member States are now made public.⁵⁹

The CFR project has divided scholars into two opposite camps supporting and opposing the Commission's agenda. On the Commission side, Christian Von Bar maintained that the CFR is an important tool for establishing coherence of European contract law.⁶⁰ Likewise, the Acquis Group claimed that its ability to provide a common terminology as well as common principles to interpret the body of contract rules would be key to fostering coherency in European contract law.⁶¹ In going beyond a mere functional approach, for which the CFR is simply an instrument to achieve better legislation for the internal market, the Acquis Group suggested that this tool could be used also by accession countries as a guideline for implementing European law or by practitioners in interpreting directives and then transposing national provisions.⁶²

In contrast, jurists committed to the understanding of the practice of

58. See *The Way Forward*, *supra* note 52, § 3.1.3.

The structure envisaged for the CFR . . . is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles could be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR.

Id.

59. See Europa, European Commission, Consumer Affairs, Common Frame of Reference, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/common_frame_ref_en.htm (last visited Dec. 4, 2006) (providing a database of member state experts).

60. See Christian Von Bar & Stephen Swann, *A Response to the Action Plan on European Contract Law: A More Coherent European Contract Law* (COM (2003) 63), 11 EUR. REV. PRIVATE L., 595, 597 (2003); Christian Von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379, 385 (Stephen Swann trans., 2002).

61. See Gianmaria Ajani & Hans Schulte-Nölke, *The Action Plan on a More Coherent European Contract Law: Response on Behalf of the Acquis Group*, para. 6, ACQUIS GROUP, May 15, 2003, <http://www.acquis-group.org> (follow "documents" hyperlink; then follow "EU-Materials" hyperlink; then follow "Response on behalf of the Acquis Group" hyperlink).

62. See *id.*

contract law and its social implications harshly criticized the CFR.⁶³ They claimed that the CFR is a formalist, technocratic, and exegetic enterprise launched by the Commission in order to limit the social function of contract law spurring from different national legal traditions. By dismissing the social practices embedded in domestic legal regimes, the CFR could end up reinforcing divergences instead of creating greater uniformity in European contract law. In their view, the CFR promotes a uniform application of European contract law, opening the risk of even further technocratic integration.⁶⁴

C. The Ideological Divide: Neo-liberalism Versus Social Justice in European Contract Law

The scholarly debate on the CFR reflects the current division in European private law scholarship, a division that we can roughly summarize as follows. Currently one of the most important cleavages lies between neo-liberal jurists championing for contractual freedom against social justice advocates arguing for welfarist rules within European contract law. This section underlines not only these political divisions, but it also shows how legal forms within this debate play an ambiguous role. Social justice advocates are sometimes committed to soft-law tools and other times champion hard-law approaches.⁶⁵ Similarly, neo-liberal lawyers at times advocate for uniform standards and more often for soft legal tools. The European Unfair Terms Directive adopted by the European Council in 1993⁶⁶ provides one example of the ideological divide that pervades the way jurists have been analyzing these contradictions.

Neo-liberal jurists have claimed that European contract law was a “constitutive element” of the internal market, one that enhanced its functioning mechanisms by designating the rules of the game. The harmonization of contract law contributed to strengthening the single market by ensuring a level playing field that enhanced individual freedoms. In supporting the harmonizing agenda of the Principles of Contract Law,⁶⁷ these jurists emphasized that the harmonization of contract law could provide greater information to private actors and enhance their private

63. See *Social Justice Manifesto*, *supra* note 2, at 662-64.

64. *Id.*; Hugh Collins, *Editorial: The Future of European Private Law: An Introduction*, 10 EUR. L.J. 649, 649-52 (2004).

65. See *supra* note 41.

66. See Unfair Terms Directive, *supra* note 9.

67. See COMM'N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II (Ole Lando & Hugh Beale eds., 2000); MARTIJN W. HESSELINK, THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW IN EUROPE 112-13 (Private Law in European Context Series, 2002).

autonomy.⁶⁸ In supporting the idea of a European economic constitution, they argued in favor of a European codification, which guaranteed to each person the disposition of her individual entitlements. Jürgen Basedow maintained that the notion of freedom of contract remained the core idea for a European codification since every individual has the right to affirm his or her will to enter into a binding contract. In his view, European codification strengthened economic freedoms and counterbalanced the growing importance of consumer regulation that undermined those common values enshrined in the notion of contractual freedom.⁶⁹ For these lawyers, the scope of market harmonization was to remedy the market failure created by the cleavage between commercial and non-commercial contractual regimes, which restricted market competition and created informational asymmetry.⁷⁰ These lawyers have tied claims for European codification⁷¹ to a notion of contract law as a tool for enhancing party autonomy across Member States.⁷²

These neo-liberal lawyers have devoted great attention to and supported legislative measures proposed by the Commission. However, they have highlighted that Community action should be cautious not to undermine its democratic legitimacy, which is guaranteed by European procedures and mostly by national democratic processes.⁷³ For instance, the

-
68. See PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET (Stefan Grundmann et al. eds., 2001).
 69. See Jürgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 EUR. REV. PRIVATE L. 35, 35-49 (2001). The freedom to bind oneself contractually to a future disposition is an important and striking example of this freedom. See *id.* at 42. The role of contract law “is based upon the theoretical perception that promise and the reliance on it is a basic behaviour in human society.” *Id.* at 38.
 70. See Stefan Grundmann, *The Structure of European Contract Law*, 9 EUR. REV. PRIVATE L. 505, 518 (2001).
 71. See Jürgen Basedow, *A Common Contract Law for the Common Market*, 33 COMMON MKT. L. REV. 1169, 1173-82 (1996).
 72. See AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (Stefan Grundmann & Jules Stuyck eds., 2002).
 73. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 197 (F.R.G.), translated in [1994] 1 C.M.L.R. 57 (“Maastricht Decision”); cf. Joseph H.H. Weiler, *The State “über alles”: Demos, Telos and the German Maastricht Decision* (Jean Monnet Ctr. for Int’l & Regional Econ. Law & Just., N.Y.U. Sch. of Law, Working Paper No. 6/95, 1995), available at <http://www.jeanmonnetprogram.org/papers/papers95.html> (follow “No. 6/95” hyperlink) (decrying perceived Nazi-Era notions of racial and ethnic homogeneity required for democratic legitimacy reflected in the Maastricht Decision); Peter Lindseth, *The Maastricht Decision Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation*

Community cannot take away individual rights from European citizens that the Treaty has conferred upon them.⁷⁴ In casting light on the procedural guarantees of EC law, they advocated for a European codification in tune with the functioning of the single market and for legislative discretion by supranational institutions. These jurists often share a common intellectual tradition, which can be traced back to the Freiburg ordo-liberal school, which goes also under the rubric of *German neo-liberalism*,⁷⁵ founded in the 1930s. In drawing on the ordo-liberal intellectual tradition, they traced back the meaning of notions such as contractual freedom to the post WWII economic compromise of the German social-market economy. The ordo-liberal tradition offered to the integration project an influential model of legitimation through the notion of the "economic constitution."⁷⁶ In relying on the central tenets of the ordo-liberal tradition, jurists perceive the European economic constitution enshrined in the Treaty as a means to ensure greater individual autonomy within the internal market. In arguing in favor of a European codification, they are attempting to provide a framework of general contract rules that will ensure equal possibilities to all players in a free market and create a system of undistorted competition.⁷⁷

In the late 1980s the Commission was in search of a model for drafting the future Unfair Terms Directive.⁷⁸ The Commission relied to a great extent on the German law regulating unfair contract terms. The AGBG⁷⁹ (*Gesetz zur Regelung des Rechts der Allgemeinen*

Reconsidered 8-17 (Eur. Univ. Inst., Robert Schuman Centre for Advanced Studies, Working Paper No. 2003/18, 2003), available at <http://www.law.harvard.edu/students/orgs/hela/papers/peterlindseth.pdf> (arguing that the Maastricht Decision was informed not by racial and ethnic concerns but by the German experience at the national level that a lack of clearly defined legislative delegation will result in the usurpation of democratic legitimacy by the executive).

74. See Ernst-Joachim Mestmäcker, *On the Legitimacy of European Law*, 58 RABELS ZEITSCHRIFT 615, 615-35 (1994).
75. See VIKTOR J. VANBERG, *THE CONSTITUTION OF MARKETS: ESSAYS IN POLITICAL ECONOMY* 37 (2001).
76. See MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION: A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY* 126-27 (1998).
77. See Christian Joerges, *What is Left of the European Economic Constitution?* 12, 13 (Eur. Univ. Inst., Working Paper No. 2004/13, 2004), available at <http://www.iue.it/PUB/law04-13.pdf>; see also KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM* 112 (2002); David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. OF COMP. L. 25, 25-26 (1994).
78. See Unfair Terms Directive, *supra* note 9.
79. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [Standard

Geschäftsbedingungen) (Standard Contract Terms Statute of 1976) was adopted in 1976 by the Federal German Republic to regulate standard forms agreements. The AGBG aimed to achieve a fair balance between conflicting interests in order to provide a level playing field for private actors and reinvigorate the principle of freedom of contract.⁸⁰ The AGBG already contained all those rules that characterize the Unfair Terms Directive adopted in 1993, such as the principle of good faith and the blacklist of unfair clauses. Most interestingly, it included a preliminary exception that excluded the application of both provisions when there was an individual agreement over a contract. The AGBG was adopted as a provision intended to regulate economic transactions between industry and consumers and aimed at giving greater certainty to a consistent body of jurisprudence. German scholars had long advocated for policing the imbalances and inequalities in adhesion contracts. In particular, the AGBG was associated with Ludwig Raiser, one of the prominent private lawyers in post-WWII Germany. Raiser was committed to the creation of a liberal constitutional paradigm reconstructing the relation between the law, societal values, and the economy.⁸¹

However, the Unfair Terms Directive triggered a lot of discontent for a number of reasons. Those neo-liberal jurists who were no longer committed to harmonization per se, but began adopting a "Law and Economics" approach to contract rules while appreciating the competitive advantages in soft legal regime, claimed that by policing the unfairness of contracts, the Directive had been "abused" because it created more stringent provisions than the ones contained in the German AGB-Gesetz. They argued that courts have gained disproportionate power through the blacklist of unfair terms adopted by the Directive since they can void those contract terms they consider unfair. As Roberto Pardolesi highlighted, from an economic perspective, the paradox is that in declaring the terms void, judges cannot consider the price of the contract or of the term since this is expressly left out from the realm of the Directive.⁸² In adopting United States mainstream "Law and Economics" insights, neo-liberal jurists attacked welfare provisions contained in European directives.⁸³ They

Contract Terms Statute], Dec. 9, 1976, BGBl. I at 3317, as amended (F.R.G.).

80. See LUDWIG RAISER, *DAS RECHT DER ALLGEMEINEN GESCHÄFTSBEDINGUNGEN* (1935). For a comparative overview, see Umberto Morello, *Condizioni Generali di Contratto*, in 3 *DIGESTO DELLE DISCIPLINE PRIVATISTICHE: SEZIONE CIVILE* 334, 334-60 (1998).
81. See LUDWIG RAISER, *IL COMPITO DEL DIRITTO PRIVATO* [THE TASK OF THE PRIVATE LAW] (Cosimo Marco Mazzoni ed., Marta Graziadei trans., 1990).
82. See Roberto Pardolesi, *Clausole Abusive (nei contratti dei consumatori) Una Direttiva Abusata?*, 119, pt. 5 *IL FORO ITALIANO* 137, 150 (1994).
83. Compare DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 116 (1997) (defining

deployed public choice rationales to undermine the goals of the Unfair Terms Directive, which “may cause inefficiencies rather than curing them.”⁸⁴ In drawing on mainstream “Law and Economics” insights, they argued that although the Directive aimed to protect consumers against unfairness, in reality, it raised potential causes for inefficiencies, thus creating negative welfare implications.⁸⁵

The Unfair Terms Directive also received sharp critiques from those jurists advocating for a welfarist approach to private law and distributive justice in contract law. These scholars argued that contract law should abandon a procedural conception of justice and move towards a substantive one.⁸⁶ If the notion of procedural justice entailed the protection of individual rights and market efficiency, they favored a substantive notion of justice in order to achieve an “acceptable pattern of welfare” with fair distributive results.⁸⁷ Moreover their skepticism towards the EC harmonization agenda contributed to their bias toward hard or uniform legislative tools at the European level, while favoring soft and flexible tools of regulation.

For instance, when analyzing the Unfair Terms Directive, social justice advocates began challenging the harmonization of contract law as widely driven by market rationality rather than consumer protection.⁸⁸ Their criticisms focused on the over-emphasis of the Directive on the internal market as the primary reason for justifying the harmonization of unfair contract terms.⁸⁹ For example, the preamble of the Directive

mainstream “Law and Economics” in the United States), with Roberto Pardolesi, *Economic Analysis of Contract Law: Some Insights*, 1 CARDOZO ELECTRIC L. BULL. 17 (1995), <http://www.jus.unitn.it/cardoza/Review/Contract/Pardolesi-1995/pardo.html> (follow “adhesion contracts” hyperlink) (attacking the Unfair Contract Terms Directive and its “shocking black list of standard forms whose common thread is to shift risks from sellers to buyers”).

84. See Roger Van den Bergh, *Forced Harmonisation of Contract Law in Europe: Not To Be Continued*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, *supra* note 72, at 249, 261.
85. Peter van Wijck & Jules Theeuwes, *Protection Against Unfair Contracts: An Economic Analysis of European Contract Law*, 9 EUR. J.L. ECON. 73 (2000).
86. See Hugh Collins, *Distributive Justice Through Contracts*, in 45 CURRENT LEGAL PROBLEMS 1992, pt. 2 at 49, 66-67 (R.W. Rideout & B.A. Hepple eds., 1992).
87. See Hugh Collins, *Introduction: The Research Agenda of Implicit Dimensions of Contract*, in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 1, 11 (2003).
88. See Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229, 234 (1994).
89. The Recitals in the Preamble of the Unfair Contract Terms Directive focus predominantly on the need to develop the single market and establish harmonized ground rules. See Unfair Terms Directive, *supra* note 9, paras. 1-3, 5-8. This was a

highlighted that divergence among national consumer regulations would create a risk of distorting competition. The justification for the Directive was the need to enhance competition in products and services across Member States, rather than the need to develop regulations that reflect contractual realities.⁹⁰ Finally, the Directive did not touch upon individually negotiated terms nor did it address provisions regarding the contract price.⁹¹

According to social justice advocates, the Community *leit-motif* in drafting the Directive rested on a market efficiency rationale that aimed to expand consumer choice. They pointed out that the Directive described buyers shopping for their best contractual terms across Member States and assumed that consumers would be better off through greater competition among contractual terms. They remarked that the Commission assumed consumers to be actively involved in gathering and using information to make their decisions.⁹² The Directive enlisted contract law as a market-perfecting device, through which properly informed consumers could police unfair terms.⁹³

When explaining the stakes of harmonization, jurists put forward three different theses that share a skeptical view on the European constitutional arrangement: national resistance, subsidiarity, and cultural difference. The resistance thesis focuses on the reactions of national legal regimes to the implementation of European directives.⁹⁴ According to this view, the problem of the harmonization of contract law related to the implementation of directives in Member States' legal orders, often manifests itself in national civil codes. The different outcomes of the Italian, German, and French legal regimes in implementing the Unfair

way to justify the legal basis adopted by the Directive emanating from EC Treaty art. 95, the provision governing the harmonization of the internal market.

90. An analysis of the Preamble makes it clearly evident that the internal market is the priority. See Collins, *supra* note 88, at 235 (highlighting the lack of emphasis in the Preamble to the Directive on the actual consumer contracting process).
91. See Unfair Terms Directive, *supra* note 9, art. 4(2). "The fairness of the transaction in the sense of the price paid for the goods or services should not be subjected to review or control." Collins, *supra* note 88, at 238. In Hugh Collins's view, this obscure provision of the Directive, by requiring clarity more than fairness, demonstrates how EC contract law is intended for consumer choice and not for consumer rights. See Collins, *supra* note 88, at 237-38.
92. See, e.g., GERAINT HOWELLS & THOMAS WILHELMSSON, EC CONSUMER LAW 306 (1997); WEATHERILL, *supra* note 19, at 76.
93. See Collins, *supra* note 88, at 237. As Collins puts it, there is the consumerist movement that "has percolated into the organs of the EC." *Id.* at 236.
94. See Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3, 14-17 (1997).

Terms Directive revealed not only the difficulty in harmonizing contract rules but also how little national contract laws were harmonized in practice.⁹⁵ Daniela Caruso claimed that the attempt of the Commission to reform private law through directives has actually engaged state legislators and national courts in resistance against the Europeanization process.⁹⁶

The subsidiarity thesis, based on the principle introduced by the Maastricht Treaty,⁹⁷ focuses on the social dimension of contract law as being inherently national and therefore culturally diverse. Some jurists claimed that contract law could not rely on abstract general principles that Europeanization brings with it.⁹⁸ They argued that the Commission should make greater use of the subsidiarity principle allowing Member States to regulate their contract law regimes differently.⁹⁹ The subsidiarity thesis has advanced the view that national contract law is shot-through with distributive concerns, which are now threatened from above by European market integration. According to this thesis, Europeanization is a formalist process that is suppressing diversity as an obstacle to free trade while it undermines the distributive capacity of national contract law.¹⁰⁰

Some jurists have advanced a third thesis based on the notion of cultural difference. In highly valuing the cultural diversity among national legal regimes, they demonstrated skepticism about the possibilities of the harmonization process. Drawing on sociological,¹⁰¹ cultural,¹⁰² and

95. See *id.* at 24-25. Daniela Caruso shows how the Unfair Contract Terms Directive struggled in its reception by national legal orders. The Product Liability Directive of 1985 was a similar big disappointment since Member States took enormous delays in its implementation. *Id.* at 15.

96. See *id.* at 4.

97. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 333-34 (1994). This article provides a procedural approach to determining issues of subsidiarity, rather than substantive criteria to apply. The subsidiarity principle reads:

In areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id. at 346 (quoting EC Treaty art. 5).

98. See Hugh Collins, *Transaction Costs and Subsidiarity in European Contract Law*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, *supra* note 72, at 269, 280.

99. *Id.* at 278-80.

100. See Collins, *supra* note 88, at 232-33.

101. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

linguistic¹⁰³ insights, these scholars were skeptical of the unification of private law regimes, which happened more at the level of declamations than at the level of operative rules. In their view, the harmonization of contract law erased European identities and offered a troubling systematization of contract law without attempting to tackle the fragmentation of legal contexts and the dilemmas of the welfare state.¹⁰⁴ Scholars adopting the cultural-difference thesis generally argued against Europeanization as a formalist threat to preserving the cultural tradition inherent in local or national contract law regimes.¹⁰⁵ In contrast to the various soft approaches, a new slogan proposed in 2002 was “Hard Code Now!”¹⁰⁶

D. The *Social Justice Manifesto* and the Legitimacy of the Process

In 2004, a number of jurists advocating for social justice in European private law drafted a manifesto to address the concerns of citizens about a European civil code “as an expression of cultural identity and a scheme of social justice for a market order.”¹⁰⁷ In their intellectual enterprise, these jurists embraced the idea that the new European legal culture offers a possibility to escape from the formalism of private law regimes, allowing for a more open and frank dialogue on the political and social stakes of the Europeanization process.¹⁰⁸ In sharing a realist understanding of contract law, they drafted the *Social Justice Manifesto* to oppose the notion that drafting a civil code should be a “technical problem to be overcome by experts.”¹⁰⁹

Rather than a technocratic enterprise based on neutral principles, such as freedom of contract, social justice advocates envisaged European contract law as a set of doctrinal rules chosen to advance fairness and

102. See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

103. See generally LES MULTIPLES LANGUES DU DROIT, *supra* note 45 (collecting essays on linguistic challenges in unification of law).

104. See Thomas Wilhelmsson, *Introduction to FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW* 3, 17-18 (Thomas Wilhelmsson & Samuli Hurri eds., 1999).

105. Pierre Legrand, *La Leçon d’Apollinaire*, in L’HARMONIZATION DU DROIT DES CONTRATS EN EUROPE 37 (Christophe Jamin & Denis Mazeaud eds., 2001).

106. See Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS No. 1, art. 1 (2002), available at <http://www.bepress.com/gj/frontiers/vol2/iss1/art1> (asserting that a European Code will benefit consumers, while soft-law measures would advance corporate interests).

107. See *Social Justice Manifesto*, *supra* note 2, at 655.

108. See MARTIJN W. HESSELINK, *THE NEW EUROPEAN LEGAL CULTURE* 72-80 (2001).

109. Collins, *supra* note 64, at 649; see *Social Justice Manifesto*, *supra* note 2, at 655.

distributive justice.¹¹⁰ They emphasized that the harmonization of contract law needs to be understood as part of European multi-level governance creating political consequences for citizens of the Union rather than merely a tool functional to the completion of the internal market. In opposing a technocratic approach to harmonization, social justice advocates have departed from those who suggest resisting harmonization of contract law because the European level is pervaded by a free market bias, which ultimately undermines national social welfare legislation.¹¹¹

Thus, social justice advocates claimed that the unification of private law proceeds as part of the political evolution of the construction of the European Union. Therefore, the Commission should address socio-economic values more openly and democratically through "new methods for the construction of this union of shared fundamental values (which include respect for cultural diversity) as represented in the law of contract and the remainder of private law."¹¹² Finally, in their plea for greater social justice and regulatory legitimacy they maintain:

Unless a more democratic and accountable process is initiated, there is a clear danger that these fundamental issues will never be openly addressed, and a serious risk that powerful interest groups will be able to manipulate the technocratic process behind the scenes in order to secure their interests at the expense of the welfare of ordinary citizens.¹¹³

The *Manifesto* starts with the assumption that the Commission, in its regulatory agenda, lacks a vision of fairness, because "[a]s traditionally understood, the function of the European Community is to promote a free market, not to ensure that this market is corrected in the light of distributive aims."¹¹⁴ The three ideas around which the *Manifesto* unfolds are fairness in contractual relations, the constitutionalization of private law, and the legitimacy of European modes of governance. As to the notion of fairness and the distributive effects of contract rules, the *Manifesto* suggests following the examples of national private law systems, in which the protection is based "upon social needs rather than equal opportunities, or a concern about the distributive consequences of legal rules between groups, such as creditors and debtors, and equally importantly, within such groups."¹¹⁵

110. See HUGH COLLINS, *REGULATING CONTRACTS* 356-61 (1999).

111. See *Social Justice Manifesto*, *supra* note 2, at 657.

112. *Id.*

113. *Id.* at 658.

114. *Id.* at 660-61.

115. *Id.* at 666.

While the neo-liberal agenda fosters clearly conservative goals, one may also criticize the *Social Justice Manifesto* from the left. For instance, the *Manifesto* emphasizes the need for procedural legitimacy—understood as a more democratic and participatory process for European decision-making—in the construction of European private law. While legitimacy is certainly a necessary condition for reaching social justice through the law, one might doubt that it is sufficient. A process can be politically legitimate but can lead to anti-social outcomes should, for example, a conservative ideological platform take over in the political process. Despite this possibility, the political choice to intervene in the landscape of European law with any reform proposal capable of handling (paradoxically even choosing) the current neo-liberal drift is welcome as a frontal challenge to the phenomenon of naturalization of the status quo, typical of the post-modern condition.¹¹⁶

The *Manifesto*, however, has only mildly challenged the most influential part of the lawyer's profession, which has a stake in the current equilibrium of power by controlling the lion's share of the European funding to scholarly projects. Not surprisingly, a few months after the publication of the *Manifesto* some of its authors have themselves obtained rewarding sums from the Commission to carry on social justice work while continuing to participate in the Study Group on a European Civil Code.¹¹⁷ This multiple role played by elite academics is indeed a recurrent pattern within the social structure of European private law. As a consequence, European private law scholarship is characterized by both the fragmentation of scholarly groups and the formation of grand coalitions pulled together for instrumental purposes, thus creating the phenomenon that is called the Scholarly Industry.¹¹⁸

116. See KENNEDY, *supra* note 83, at 216, 236-38 (discussing the “naturalization effect” in adjudication).

117. Headed by Christian Von Bar, this group, comprised of academics from the EU, has undertaken the task of “produc[ing] a codified set of Principles of European Law for the law of obligation and the law of property.” Study Group on a European Civil Code, <http://www.sgecc.net/pages/en/home/index.welcome.htm> (follow “Introduction” hyperlink) (last visited Dec. 4, 2006).

118. For a brilliant analysis on this subject by an anthropologist assessing the economic and symbolic power of each group within the field of European private law, see Agnes Schreiner, *The Common Core of Trento, A Socio-legal Analysis of a Research Project on European Private Law*, in IN LAWYERS' CIRCLES: LAWYERS AND EUROPEAN LEGAL INTEGRATION 125, 125-40 (Alex Jettinghoff & Harm Schepel eds., 2004).

E. The Scholarly Industry and Its Dark Sides

It is now worth devoting a few thoughts to European academic legal scholarship, a very important component of the patchwork of European private law in the making. As it is well known, legal scholarship has played a pivotal role throughout the history of European private law, at least since the renaissance of legal studies in Bologna early in the eleventh century. Comparativists have observed that in the Western legal tradition academic scholars thrive and blossom as *hidden law givers*¹¹⁹ particularly in times in which the official authority of law is declining or where the law presents itself as divided and in need of some rationalization. In the United States, Justice Cardozo noticed a similar phenomenon when he observed in the 1920s that “the perplexity of the judge becomes the scholar’s opportunity.”¹²⁰ It is no surprise, therefore, that the highly complex relationship between official producers of private law in present day Europe would produce such an opportunity that some European academics would quickly seize.

Elsewhere, we have described the variety of “professional projects”¹²¹ that might have motivated the academics that have taken a critical position towards European codification, an issue that we do not wish to re-open here.¹²² We are now interested in moving a step forward by observing a more pervasive phenomenon that can be better understood as the role of the bourgeois European legal academia in the production of the ideological component of a hegemonic project. Building on the work of Guy Debord,¹²³ one can observe that in the production of the “spectacle” (or, if we prefer, an aesthetic of European private law) determining the limits of acceptable discourses,¹²⁴ both the authorities participating in its construction and those that became authorities of its critique, play a similar

119. See Antonio Gambaro, *Il Successo del Giurista* [The Jurist’s Success], in 106 *IL FORO ITALIANO* 86 (1983); see also JOHN P. DAWSON, *THE ORACLES OF THE LAW* 95-97 (spec. ed., Greenwood Press 1994) (1968).

120. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 6 (10th prtq., Yale University Press 1954) (1924).

121. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

122. See UGO MATTEI, *THE EUROPEAN CODIFICATION PROCESS: CUT AND PASTE* (2003).

123. See GUY DEBORD, *SOCIETY OF THE SPECTACLE* (Ken Knabb trans., Rebel Press 2005) (1968).

124. See Pierre Schlag, *The Aesthetics of American Law*, 115 *HARV. L. REV.* 1047 (2002). For a more critical comment, but in a vein similar to that of this paper, see Heather Hughes, *Aesthetics of Commercial Law—Domestic and International Implications*, 67 *LA. L. REV.* (forthcoming 2007) (manuscript on file with authors).

role. Consequently, what we are observing is independent from the euro-friendly or euro-skeptical positions of the different legal scholars who are active in the field. Both groups share a belief in the culturally legitimized and thus respectable, and even desirable, nature of professionalized private law, thus regarding the Western legal tradition as a cultural path and as a domain of knowledge of which Europeans should be proud. If, to the contrary, one observes for just a moment, European private law as a "social practice" (or better as an aggregate of social practices) belonging to a dominating social class and serving, by the building of an ideological superstructure, the economic base of current (European) capitalism, the attitude towards its desirability is bound to change. One then should see European private law *today* (thus letting aside its more general historical role in Western imperialism and plunder) largely as the product of an anti-law movement, aimed at dismantling the concessions granted to subordinate classes at the advantage of an outright return to a "far west" of unregulated market behavior.

Such an anti-law movement is at play, produced by exactly the same global actors, both in the United States and in Europe (and the other periphery). Clearly its effectiveness in de-civilizing the law is in direct proportion to the weakness of the formal and informal institutional background in which it operates and the resistance that it is likely to find in the institutional setting.¹²⁵ In the United States, the anti-law movement is busy, among many other things, preaching for lowered punitive damages and the reduction of the role of the civil jury. It is also behind the construction of the Law and Economics and Alternative Dispute Resolution (ADR) scholarly industries.¹²⁶

The strategy, exposed by Laura Nader in her ground-breaking work on "harmony ideology," works as follows: an idea, loaded with positive meaning, is identified which may be a good cure for a social problem. We do not need to spend time here on the issue of whether the "lack" that the idea is attempting to cure is real or invented.¹²⁷ The example discussed by Nader was that of ADR, but there are a variety of others, such as, for example, the idea of "development," that of "international human rights," or that of "efficiency." Such ideas are usually broad, vague, and difficult to challenge; who would argue against the fact that justice should be easily

125. In the sense used by DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

126. See LAURA NADER, *THE LIFE OF THE LAW* (2002) (emphasizing the importance of the civil litigant versus the power of the state and the corporation).

127. For example, the litigation explosion that originated the ADR frenzy in the United States has been largely invented. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986).

available, that poor countries should be made better off, that human rights should be respected, that it is better to organize something in an efficient way, or, by the same token, that one should love his or her mother? Around that idea, an intellectual movement of scholars producing work in the area is identified by useful promoters of that idea as an ideology serving a hegemonic project. Their work is consequently encouraged, promoted to mainstream status by the usual patterns of academic prestige, and directly or indirectly funded. Usually the phenomenon does not remain at the academic level; rather, the scholarly work organized and institutionalized as an industry gets used for a variety of policy functions. The industry thus grows, develops its patterns of prestige and leadership, its canon, its aesthetics, its foes, and its friends.

Nader has shown the phenomenon in the birth of the ADR industry, promoted as a challenge to the civil rights movement in the late 1960s, and now powerfully at play through the world. It is quite easy to see the birth and flourishing of an International Human Rights industry, promoted and organized by Western non-governmental organizations, highly instrumental in the construction of non-Western inferiority and in the ethnocentric promotion of Western values in such things as gender relationships or family arrangements. Similarly, law and development, which started as an industry during the Cold War, has declined but it is now back on its feet, again playing a significant anti-law role in its contribution to the Washington consensus version.¹²⁸

One of the authors of this Article has identified the development of an "industry" in the transformations of the "Law and Economics" movement, now pivotal in the policy-making of the international financial institutions.¹²⁹ Some of its mainstream anti-law work, attempting to limit the bite of punitive damages, is now financed openly and shamelessly by gross polluters such as the Exxon Corporation.¹³⁰ This scholarly industry, extremely powerful and well-funded in the United States and abroad, delegitimizes the role of the law as a tool of control and constraint to free market activity. Moreover, it aims to capture political and legislative processes under the claim of neutral and efficient rules, improving wealth

128. See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

129. See Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220 (2005); see also JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 181-84 (2004).

130. See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 748-52 (1996).

maximization in market economies.¹³¹

Once a scholarly industry is organized and promoted in the law, the individual academic active in the field of inquiry occupied by the industry is irresistibly attracted to it. Being internal to the industry offers career and consulting opportunities for oneself and for his or her students, and even the policy perspectives stemming from it are attractive for the true believers and insiders. These academics in the scholarly industry thus develop loyalties and in little time their radical critiques and exposing modes are marginalized and silenced. True, bourgeois academic industries pride themselves on being open and pluralistic. Scholars are not censored. Rather they tend to self-censor. The industry becomes itself a strong “cultural” support for projects of hegemony and domination, and within the industry, the fundamental conception of the law as a civilizing device capable of promoting order and freedom is part of the social contract. Truly anti-spectacular critiques stemming from a perception of law as a super-structure, to be resisted as the oppressive capitalistic domination that produces it, are perhaps received raising more than one eyebrow. Usually they fall short of reaching the mainstream channels of scholarly communication, the most prestigious publishers, and the leading journals. These venues are dominated by “true” insiders and the rejection letters will always be based on truly “objective” scholarly standards. Most of the time, the industry is even able to organize the resistance in a display of methodological pluralism in the best tradition of the post-modern identity, thus occasional critical work might see the light. Nevertheless, if ever critical ideas are published, the books are not promoted and perhaps not reviewed. Insiders to the industry do not like to confront “radical” questions. Harmony has to be preserved. Troublemakers are not welcome.

European private law, much like “Law and Economics” in the United States today, is an industry. It fully participates in what is the truly dangerous radical anti-law movement—not just that of a few scholars concerned with equality, struggling for social justice and political transformation. The real anti-law movement today is promoted and supported by the corporate domination of public spaces. Scholarly industries, determining the space of acceptable speech, contribute to this process of de-legitimization of the traditional political tools potentially capable of being used to control economic processes: the positive law

131. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136-38 (2003) (asserting that underlying assumptions of legal economists includes certain “interpretative biases” that are inherent in human thinking); Jon D. Hanson & Douglas A. Keysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

produced by sovereign States. The industry of European private law shares its crusade against the political-based production of law with that of "Law and Economics" (and with the other industries glimpsed above). Anti-positivism turns into anti-state, and anti-state into anti-law. The baby is thrown away with the bathwater.

In the European Union, the political actors in the corporate anti-law movement are the same as those in the United States, but the targets and the means are different. While the targets are the Member States' legal systems, with their incremental development of institutional systems of "social" private law (protective formalism, mandatory law, notarized acts, and measures of contractual justice such as the broad use of "unconscionability" or "good faith"), the means are the creation of another industry, the so-called "new" European private law. Because the transformation of scholarly movements into industries precludes critical thinking, the consequence of this move is the incapacity to set an independent agenda and the desire to follow that of corporate-captured Brussels, in the hope of obtaining funding and prestige. The emphasis on "contract" as the privileged tool of the European private law process is no small part of such hegemonic agenda.¹³² The "contractualization" of the legal and political spaces, in fact, has opened new venues for neo-liberalism, suggesting a flexible order in which rights and secured positions are abandoned to the market logic.

While both approaches have been saluted as widely needed challenges against obsolete legal formalism and positivist approaches to legal reasoning, in both contexts they ended up as an ideological legitimization of the new global legislators. In the United States, efficiency functioned as the key element of success of the anti-law movement by endorsing its neo-liberal policies. The transformation of European private law scholarship into an industry has been a successful strategy by which Brussels has both selected its neo-liberal allies (Lando, Von Bar, etc.) and has, so to say, "organized" the resistance.¹³³ In fact, a "Network of Excellence" created by the Commission's Sixth Framework Program brought together neo-liberal expectations with some of the social justice

132. An organization that has flourished for this purpose is the Society for European Contract Law (SECOLA), which has been highly instrumental to the present focus on a contractarian vision of the European legal landscape. See SECOLA, <http://www.secola.org> (last visited Dec. 4, 2006). Its most recent publishing effort is *GENERAL CLAUSES AND STANDARDS IN EUROPEAN CONTRACT LAW: COMPARATIVE LAW, EC LAW AND CONTRACT LAW CODIFICATION* (Stefan Grundmann & Denis Mazeaud eds., Private Law in European Context Series, 2006).

133. See Ugo Mattei, *Basics First Please! A Critique of Some Recent Priorities Shown by the Commission's Action Plan, in TOWARDS A EUROPEAN CIVIL CODE* 297, 297 (A. S. Hartkamp et al. eds., 3d ed. 2004).

concerns portrayed by the *Manifesto*.¹³⁴ This Network of Excellence has the task of drafting the CFR, in which the neo-liberal allies of the Commission have an important role in driving the process.¹³⁵

Many socially concerned scholars avoid asking fundamental questions such as whether capitalism can be reformed incrementally, eventually leading to some idealized state of sustainable development.¹³⁶ Many such scholars perhaps even believe that the private law system can play a role in this reform. They seem oblivious to the fact that such a belief compels European law to follow an agenda established by hegemonic actors, with no interest in legal civilization, but rather with a clear agenda of dismantling what is left of it. We argue here that an incremental transformation towards a progressive dimension in private law is impossible (while perhaps a gradualist strategy cannot be excluded), that there is a need for a frontal challenge, and that at least an independent leftist agenda should be established.

II. SOCIAL CONTRACT LAW AND SOCIAL EUROPE, PART OF THE PROBLEM OR PART OF THE SOLUTION?

A. The “Social” Critique of Formalism in Contract Law and Its Historical Inadequacy

To be sure, the meaning of the word “social” in legal matters is much more complex and endowed with a long and ambiguous pedigree in private law than the recent and quite feeble resurgence of a political sensitivity in the debate on European private law would suggest. European private lawyers share the “social” intellectual tradition as a “vocabulary of legal concepts” that underwent a radical shift at the beginning of the twentieth century.¹³⁷ Duncan Kennedy, himself associated with the *Social Justice Manifesto*, nevertheless considers the “social” as one of the very few

134. See Research Directorate-General, *FP6 Instruments: Implementing the Priority Thematic Areas of the Sixth Framework Programme*, EUR. COMM’N (2003), http://ec.europa.eu/research/fp6/pdf/brochure-fp6_en.pdf.

135. See Martijn W. Hesselink, *Capacity and Capability in European Contract Law*, 13 EUR. REV. PRIVATE L. 491, 494 (2005).

136. For a critique, see SERGE LATOUCHE, *SURVIVRE AU DÉVELOPPEMENT* (2004).

137. This Article seeks to address and clarify the multiple meanings of the term “social” as well as to underline its ambiguity and vagueness within the debate on European private law. This Article uses the term “social” mostly as an adjective in reference to Europe, (social Europe) and contract law (social contract law), however it also adopts the term as a noun (the “Social”) by referring to a particular form of legal thought or legal consciousness as described by Duncan Kennedy in his article, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631 (2003).

general legal patterns that historically has been capable in the past of characterizing a global way of thinking about the law.

Initially, the formalist or mid-nineteenth century approach to contract law was rooted in Kantian philosophy and translated into private law by Savigny through the notion of individual rights as forms of sovereignty "absolute within their sphere."¹³⁸ Private individuals were guaranteed freedom from any interference in the enjoyment of their private rights, which were protected by means of an abuse of deductive reasoning.¹³⁹

At the beginning of the twentieth century, some European scholars elaborated a critique of contractual freedom to break with the nineteenth century will-theory in contract law.¹⁴⁰ Their approach was based on the social and moral perception that industrialization heightened existing economic disparities, which created unfairness between contractual parties. According to Kennedy, after a first wave of globalization of "classical" legal thought, beginning early in the twentieth century a "social legal consciousness" became capable of globalization, expanding its legal assumption well beyond the French and German academy where, thanks to scholars such as Josserand or Gierke, it developed as a reaction to the formalist thinking of the classical era.¹⁴¹ For instance, Jhering's critique of individual sovereignty brought into question the coherence of legal reasoning, which was no longer a matter of deductive interpretation but it was rooted in mechanical social causes and moved by human ends.¹⁴² In the beginning of the twentieth century, some jurists elaborated an objective conception of contract law, which is today a crucial legacy among private

138. See FRANZ WIEACKER, *STORIA DEL DIRITTO PRIVATO MODERNO* [HISTORY OF THE MODERN PRIVATE LAW] (Umberto Santarelli trans., 1980) (1967). This conception of individual rights is traced back to the classical legal thought of F.C. von Savigny. In case of conflict between two individual rights, legal professors resolved the conflict by deducing a solution from individual rights.

139. See Kennedy, *supra* note 137 (explaining the abuse of deduction in classical legal thought).

140. See Hugh Collins, *The Voice of the Community in Private Law Discourse*, 3 EUR. L.J. 407 (1997).

141. See Kennedy, *supra* note 137, at 648-51. Kennedy further posits that the social mode of thought, which characterized the 1900-1950s, has recently yielded to a third globalization of "Americanized" legal thinking. This mode consists of a neo-formalist revival in the law, once more understood as a merely technocratic artifact serving the needs of economic expansion rather than those of human civilization and solidarity. In a sense, the "social" has been finally abandoned while a mode of reasoning derived from the social, namely balancing between conflicting policies, is still predominant in current legal thinking. *Id.* at 674-75.

142. See RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* (John J. Lalor trans., 1879) (translated from the 5th German edition).

lawyers.¹⁴³

If this social perspective on contract law has a multifaceted methodology and it is politically ambivalent, there are at least two elements in its legal language that traveled in time but have radically changed their meaning when developed by the social consciousness at the beginning of the 1900s once translated in the current European private law debate post-1950s.¹⁴⁴

The first element of the vocabulary of the "social" is objectivism in contract law. For "social" jurists, the unfairness resulting from the individualist doctrine of freedom of contract can be corrected by an objective notion of contract, endorsing altruistic values. A contract is no longer based on the subjective intention of the parties, as an expression of their free will, but requires a limitation of contractual freedom to fulfill the objective function of those transactions involving a plurality of social and economic interests. In response to the rapid industrialization and the growing interdependence of social reality in the beginning of the twentieth century, the objective function of contract developed as a doctrine to address inequalities in Western legal thought and to protect disadvantaged groups and minorities through special legislation.¹⁴⁵ As a consequence, the doctrinal shift, still of relevance today, is the move from a conception of absolute individual rights to notions of abuse of rights and the limits of contractual freedom as a general limitation of right-based approaches.¹⁴⁶

A second element of the vocabulary of the "social" in contract law is the strategic invention of solidarity, which characterized the social economy of republican states struggling against conservative and revolutionary forces.¹⁴⁷ The rise of organic solidarity in an increasingly

143. See Kennedy, *supra* note 137, at 648-51.

The Social people had four positive proposals: (1) from the social "is" to the adaptive "ought" for law, (2) from the deductive to the instrumental approach to the formulation of norms, (3) not only by the legislature but also by legal scientists and judges and administrative agencies openly acknowledging gaps in the formally valid order, (4) anchored in the normative practices ("living law") that groups intermediate between the state and the individual were continuously developing in response to the needs of the new interdependent social formation.

Id. at 651.

144. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000).

145. See WIEACKER, *supra* note 138, at 289.

146. See LOUIS JOSSEAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ: THÉORIE DITE DE L'ABUS DES DROITS* [OF SPIRIT OF RIGHTS AND THEIR RELATIVITY] 386 (1927).

147. See JACQUES DONZELOT, *L'INVENTION DU SOCIAL: ESSAI SUR LE DÉCLIN DES PASSIONS POLITIQUES* [THE INVENTION OF THE SOCIAL: AN ESSAY ON THE DECLINE OF POLITICAL

specialized and interdependent society influenced the regulation of contract law. For instance, the housing sector after WWI became a “coerced housing economy.”¹⁴⁸ Because of the housing crisis in Europe, governments intervened through rent control legislation that imposed prices and protected tenants against landlords. When rent control regulations were under attack all over Europe in the late 1970s, inducing fear that a regulatory gap would emerge from their dismantlement, Wieacker highlighted that the legislature could still circumvent the problem with a sort of “compensatory move,” by introducing a contract law regime which would make it more difficult to terminate the rental contract or by creating subsidies for social housing.¹⁴⁹

Today, well outside of the original historical context in which the “social” unfolded in Europe and the United States, what is diffused in the new European legal culture¹⁵⁰ and the *Manifesto* might be nostalgia, synonymous with a time-honored vocabulary that either only reproduces the social perspective’s parts, or produces a misunderstanding of them.¹⁵¹ Thus, what is needed today is a full updating of these seemingly critical notions to the current vocabulary, characterized by the challenges of economic liberalization and a “third globalization” of legal thought.¹⁵²

B. The Critique of the Social and Its Erasure in the *Manifesto*

There are many possible lines of inquiry that show why the belief in a reasonable, coherent, and overall social approach in private law is no longer acceptable without great skepticism. The *Social Justice Manifesto* paid no attention to these critiques with the unfortunate result of using the “social” as a positively loaded notion. This Article provides three of them among many. First there is what Duncan Kennedy, inspired by European philosophers and sociologists,¹⁵³ has called the Death of Reason narrative,

PASSIONS] 76-86 (1984) (citing ÉMILE DURKHEIM, LA DIVISION DU TRAVAIL SOCIAL [THE DIVISION OF LABOR IN SOCIETY] (1893)) (describing the influence on the social perspective by Émile Durkheim and the shift in the notion of an organic solidarity founded on the division of labor which increases specialization and interdependence among individuals at the same time).

148. See WIEACKER, *supra* note 138, at 292.

149. *Id.*

150. See HESSELINK, *supra* note 67, at 169-71.

151. See Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law*, in THE POLITICS OF A EUROPEAN CIVIL CODE 9, 9-31 (Martijn W. Hesselink ed., 2006).

152. See Kennedy, *supra* note 137, at 674-78 (explaining that a third globalization of legal thought is characterized by a new legal consciousness, which speaks the language of rights and neo-formalism as well as the one of balancing conflicting policy values).

153. See Max Horkheimer, *The End of Reason*, in THE ESSENTIAL FRANKFURT SCHOOL

which has pervaded European legal consciousness since the middle of the twentieth century.

[L]egal consciousness participates in an even more general or abstract history of American thought that in turn participates in a Western story of loss of faith. It is important that loss of faith is something that happens as an event along a rationalizing work path that transforms whatever discourse we are talking about, so that we lose faith (or don't) in reason in a world that has been transformed by reason, rationalized to the point of arbitrariness, so to speak.¹⁵⁴

If the "social" was a predominant mode of legal consciousness in Europe, it also produced the seeds for its end. Through Weberian disenchantment towards legal reasoning, and its increasing rationalization, jurists reconciled with a loss of faith narrative, which denied transcendence and coherence of formal legal rationality while unmasking violence and coercion in the acceptance of legal rules.¹⁵⁵ Thus, rules embedded in the vocabulary and the institutional imagination of the "social" can no longer provide unquestioned solutions. Rather, the lack of balancing between conflicting interests behind each rule, and the unquestioned acceptance of a legal rule instead of an alternative one, turns out to be the very core of the inadequacy of a social contract law.

A second critique addresses the skepticism towards welfarist legislation that, in the 1970s, legal economists in Chicago articulated clearly, and which influenced legal thought on both sides of the Atlantic. In their attempt to undermine the possibility of social legislation and its unintended consequences, mainstream legal economists defended the notion that welfare legislation was necessarily hurting the people it was trying to help.¹⁵⁶ In fact, through the increase in prices of consumer goods, sellers could easily pass on the costs of a warranty to the consumers. In this way, the beneficiaries of the warranty would be driven out from the market. For instance, in addressing compulsory terms, which performed an insurance-like function for buyers, mainstream "Law and Economics"

READER 26, 27-28 (Andrew Arato & Eike Gebhardt eds., 1978); CATHERINE COLLIOT-THÉLÈNE, *LE DÉSENCHANTEMENT DE L'ÉTAT: DE HEGEL À MAX WEBER* (1992) (discussing the disenchantment of the state from Hegel to Max Weber).

154. Kennedy, *supra* note 144, at 98.

155. Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, in MAX WEBER'S *ECONOMY AND SOCIETY* 322, 337-39 (Charles Camic et al. eds., 2005).

156. Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1058, 1081-82 (1977).

scholars argued that compulsory warranties created inefficient outcomes by diminishing overall consumer welfare by creating higher prices. The warranty undermined the purpose of reducing transaction costs through contracts of adhesion, while it made marginal groups of consumers worse off because they were priced out of the market. Thus, according to these scholars, compulsory warranties in consumer contracts run counter to redistributive rationales by creating non-optimal market results.¹⁵⁷

A third reason to be skeptical of the “social” stems from the so-called constitutional asymmetry theory.¹⁵⁸ European institutions engaged in centralized private-law reform have often supported the deregulatory process initiated in the late 1970s by conservative national governments. For instance, the Product Liability Directive managed to lower the standards of protection for consumers in several Member States, especially where these rules were not highly visible because they were created through judicial lawmaking.¹⁵⁹ From the viewpoint of welfarist advocates, Member State autonomy is severely limited by the new European legal order for the sake of achieving a fully integrated market, and Europeanization threatens to dismantle national social provisions. Because of a “constitutional asymmetry” pervading the European Union, neither the Community decision-maker, nor the Member States have the comprehensive regulatory capacity to undertake a strategic compensatory move to implement reforms or create new contract, administrative, or criminal law rules.¹⁶⁰ Obviously, faith in the “social” loses much of its steam if one embraces the constitutional asymmetry theory.

These three lines of critical inquiry suggest departing from the vocabulary of the “social” in private law. Rather, they strive to find answers to the critique of the “social.” Not only should progressive projects articulate these answers, but they ought to set aside the “contested concept”¹⁶¹ of social values for their agenda, no matter if the word “social”

157. *Id.* at 1067. The efficiency of standardized contract lies in its internal construction: once the seller pre-establishes the terms of the contract, the consumer is presented with a “take it or leave it” agreement. Both buyer and seller thereby avoid further transaction costs of negotiating individual agreements, while a legal rule restricting the enforceability of standardized contracts creates large efficiency loss.

158. See Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MKT. STUD. 645 (2002).

159. See Caruso, *supra* note 43, at 753.

160. See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT’L L.J. 331, 345 (2003); Fernanda Nicola, *Another View on European Integration: Distributive Stakes in the Harmonization of European Law*, in PROGRESSIVE LAWYERING, RETHINKING STRATEGIES AND IDEOLOGY (Clare Dalton & Dan Danielson eds., forthcoming 2007).

161. Kennedy, *supra* note 151, at 9-31.

is accompanying words like “justice,” “rights,” and “modes of legal consciousness,” which are only contextually meaningful today. Most importantly, in the European context, one should give full consideration to the fact that the Network of Excellence of scholars drafting the CFR have included “social justice” into a hegemonic project, that of constructing the private law industry that is part either of the third globalization or imperial Americanization of law. Further it is mandatory to avoid confusion between the “social” as a scholarly notion, intrinsic to private law, and the “social” as a political essence of current Europe, something that we turn to explore now.

C. Social Europe: A Solution or a Competitive Hegemonic Project?

With the fall of the Soviet Union, the international political field has been reconstructed as an essential end-of-history. Socialist alternatives either have been largely erased (think about the experience of Cuba, or the more recent ones in Venezuela or Bolivia), demonized (North Korea), or reconstructed in Western-capitalists’ terms (think about China). Non-socialist alternatives have been relentlessly fought (Afghanistan, Iraq, Iran, etc.). Within the dominant West, an opposition—that between European social capitalism and Neo-American capitalism—has been introduced,¹⁶² emphasized,¹⁶³ and accepted as a self-image of many European moderate leftists.

European capitalism has been characterized by a much more social flavor than its United States counterpart.¹⁶⁴ Should European law be able to capture and reflect, in the rules of the game it sets forward, some of the values comprised in the “European social model,” it might impose itself as a model capable of competing with United States hegemony. Is that a desirable outcome as seen from the left? Is a model of gentle capitalism, based on a radically unequal pattern of resource distribution (due to colonial accumulation and double standards in international trade), what we should look forward to?

Across disciplines, scholars have articulated the European identity in

162. This opposition between Rehnian capitalism and Neo-American capitalism has been introduced by the French economist MICHEL ALBERT in *CAPITALISME CONTRE CAPITALISME* (1991).

163. Cf. JEREMY RIFKIN, *THE EUROPEAN DREAM: HOW EUROPE’S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM* (Polity Press 2004) (showing that the European culture’s commitment to community values and quality of life over materialism and individual goals results in improved holistic well-being as measured at a community and individual level).

164. See GIAN MARIA GROS-PIETRO ET AL., *ASSETTI PROPRIETARI E MERCATI FINANZIARI EUROPEI* (2001).

opposition to the United States model of homologated capitalism. The European Union stands as a softer, more diverse, and ultimately more social model of market integration.¹⁶⁵ If the United States stands as a multi-ethnic melting pot pervaded by racial and socio-economic segregation, the European Union stands as a welfare regime that protects its citizens, but not its outsiders, through rights-based and solidaristic multicultural claims.¹⁶⁶ We should be wary of such flawed theories that are aimed to construct capitalism as a sustainable model of development; provided some moderate reforms of its most savage distortions are cured. The essence of capitalism is much easier to perceive when it has its gloves off, and one of the risks of the social aesthetics is exactly its working as an ideological device, masking a reality of hypocrisy, neo-colonialism, and exploitation. No progressive agenda should point at an alternative hegemonic model. Hegemony is what should be relentlessly criticized, and the real issue, on which it is hard to take a side, is whether the law can or cannot serve at least transitional, anti-hegemonic purposes.

In departing from these competitive hegemonic views, from a progressive political perspective, the possibility of Social Europe is no more than a compromise of realism, but it might, at least, be a first step in the gradualist construction of a more civilized worldly legal landscape.¹⁶⁷ A progressive agenda ought to look for solutions by considering the variety of European social models through the awareness that market outsiders, immigrants, and those who have no access to business transactions, who may be the first beneficiaries of Social Europe should a platform of opening it up become successful. Thus, European integration could be seen as a moderate redistributive exercise.

We will pose here only a few questions for discussion that have been largely ignored by European private law serving the function of an industry. Our goal is to tackle those preliminary issues that the continued scholarly debate should clarify to make political choices possible.

165. See ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE* (Rodolfo DeBenedetti Lecture Series, 2004); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union 9-10* (June 13, 2006) (unpublished paper prepared for presentation at the ARENA Seminar, Centre for European Studies, University of Oslo), http://www.arena.uio.no/events/seminar/papers/2006/Zeitlin_June06.pdf.

166. See ÉTIENNE BALIBAR, *WE, THE PEOPLE OF EUROPE?* (James Swenson trans., 2004); HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* (Jeffrey Flynn trans., 2005).

167. Cf. Guy Canivet & Horatia Muir Watt, *Européanisation du droit privé et justice Sociale [Europeanization of Private Law and Social Justice]*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [Z. EU. P.] 517, 517-22 (2005) (F.R.G.).

Institutions should serve a purpose. Proposed reforms and changes should create advantages and benefits for the community they serve. Consequently, the first question to pose is: whose interests does the European private law system have to serve? Is the European law only to serve the interests of the Europeans? Alternatively, is Europe a sufficiently strong world power (both in terms of economy and culture) that its legal system can influence global developments in the present moment of high uncertainty about what path we should walk in the future of world capitalism? We submit that European private lawyers should take full advantage of the cosmopolitan perspective stemming from their more cosmopolitan background, which has proven to be a necessity rather than a choice in present-day Europe. For example, they should think worldly, imagine a legal structure of the European market capable of working as a model that serves the global community and not merely the European interests.

European lawyers, if paralleled with their U.S. counterparts, have been good comparativists but very poor economists and social scientists. This lack of knowledge of other social sciences has, for a long period of time, confined European lawyers (common lawyers as well as civilians) to a useless black-letter style of legal positivistic analysis that has made them completely disregard the social and economic impact of their legal constructions. Once the costs of legalism have been understood, at least by some avant-garde (mostly comparativists) in a relatively recent past, the poor conditions of the background understanding can stop playing a negative role. In the efforts of their *kampf* against positivism and in the late and hasty discovery of the existence and virtues of the market, many European lawyers (as well as a large number of policy makers throughout the political spectrum) have trusted the virtues of an unregulated market much more than what is in order. Rather than limiting and trimming regulation where wasteful, European legal culture, similar to "Law and Economics" in the United States, participated in surrendering the political process and its legitimated production of binding rules of behavior to unrestricted market practices only softly regulated, when regulated at all. This trend, to say the least, is based on bad economics.

European policy makers should not underestimate the major potential impact of what happens today in Europe in the current lawless global corporate marketplace. Many people in the world (including, in the United States, the many discontents of the World Bank, and the IMF as global lawmakers) would welcome a truly responsible piece of economic legislation, something that Europe owes to humankind to make good its less than respectable exploitive past. A radically reformed European legal system, prestigious because of the culture behind it, could become, in the global world, a true world model; provided that mainstream European

intellectuals and policy makers stop their self-congratulatory attitude stemming from an ideological construction of our tradition, as if Europe were not in the past and in the present responsible for much suffering and strife in the world. If, as a leading legal system, Europe begins to change its attitude towards lawless capital globalization in favor of a more progressive and redistributive model of economic development, this could be the first move of a countertrend away from global hegemony and exploitation.¹⁶⁸

D. Social Europe Versus Socialist Europe

Just like in using notions such as “the social,” European private lawyers have deployed a term that lost its contextual values and its most sophisticated legal implications. Similarly, European scholars have plunged into European integration and a “third globalization” with no awareness of their own path in the building of a progressive legal regime. In the last fifteen years a lot has been written on the fall of socialism in the former Soviet Union. A variety of explanations, more or less self-congratulatory, have been advanced but no attempt has been made to shed light on two aspects, both strictly connected, with the present state of European private law. First, no attempt has been made to appraise the *positive* contribution of Socialist and Communist scholars to private law in Europe, including such diverse experiences as the “Uso alternativo del diritto”¹⁶⁹ in the Italian legal academy of the 1970s and the East German Civil Code of 1975.¹⁷⁰ These genuine and ambitious contributions to the development of a more inclusive system of private law have been hastily and unfairly dismissed. Second, no effort has been made to appraise the *negative* consequences for European law of the fall of the Soviet Block. Nevertheless, a clear appreciation of the impact of the release of Cold War pressures on European law makers after the symbolic fall of the Berlin Wall is the indispensable context for any significant analysis of social trends in European law today.

168. See Stephen R. Gill & David Law, *Global Hegemony and the Structural Power of Capital*, 33 INT’L STUD. Q. 475 (1989) (“[explaining] some of the conditions under which a more ‘transnational’ regime of accumulation and an associated hegemony of transnational capital might develop”).

169. See PIETRO BARCELLONA & THOMAS BLANKE, *L’USO ALTERNATIVO DEL DIRITTO: SCIENZA GIURIDICA E ANALISI MARXISTA* (1973); PIETRO BARCELLONA & THOMAS BLANKE, *II ORTODOSSIA GIURIDICA E PRATICA POLITICA: SCIENZA GIURIDICA E ANALISI MARXISTA* (1973); see also *CATEGORIE GIURIDICHE E RAPPORTI SOCIALI: IL PROBLEMA DEL NEGOZIO GIURIDICO* (Pietro Barcellona & Cesare Salvi eds., 1978).

170. It is therefore particularly important that we recognize the initiative of Professor Luca Nivarra of the University of Palermo (Italy) who has convened a conference on the legacy of the “seventies” in private law for July 2006. Information on the conference is available at <http://www.unipa.it/~dipriv/ascarelli.htm> (last visted Dec. 5, 2006).

One can observe, in general, that private law in Europe historically unfolded remotely from social concerns—the traditional domain of the public law in the civilian taxonomy. Naturally, there have been a variety of early counter-tendencies in this mainstream attitude to consider wealth disparity and power imbalance as irrelevant to private law. The rich debate on the so-called “social function” of rights that occupied the 1930s in Europe witnesses such wealth of thought, spanning from the Second International to the Catholic solidaristic tradition, even reaching some aspects of the so-called “fascist conception” of property law.¹⁷¹ Even in the mainstream, nevertheless, a political platform of equality and an agenda of redistribution of wealth, mostly but not only located in the public law tradition, has characterized, with different degrees of intensity, the first three-quarters of the twentieth century. Such a platform, put at the center of national political processes by the workers and trade union movements, stimulated the growth of the Welfare State institutions, a more or less conscious strategic concession of the industrial bourgeoisie to avoid an anti-capitalist revolution. While this social welfare has often been fiercely resisted both from the right (particularly by the more reactionary and authoritarian industrialists) and from the left (challenging social institutions as Foucaultian controlling processes), it is a fact that the weak actors of society have received some material benefits from the birth of welfare state institutions, with consequent increases in human civilization and dignity.

In a number of countries where socialist and communist parties have been able to survive the relentless persecution of Fascist regimes, reaching some degree of power through the Cold War, some local legal scholarship has developed a genuine social dimension, something far more advanced than the “third way” compromise reached in the mentioned *Social Justice Manifesto*. Consideration should be given to the fact that the Welfare State, and more generally, the traits of the so-called European social (or Rhenan) capitalism, developed together with a variety of protective policies and within a strong role of the State into the Member States’ economies, which have been anathema to Brussels from the very beginning of the European Common Market.

The market is healthy when there is open competition with other institutions, especially within the legal system and the political process.¹⁷² However, the Common Market should neither be ignored nor made the object of idolatry, as the accession in May 2004 signified for many of the newcomers to Social Europe in departing from their Socialist and

171. See KARL RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* (Otto Kahn-Freund ed., Agnes Schwarzchild trans., Routledge/Thommes Press 1976); see also Kennedy, *supra* note 137, at 648-51.

172. See NORTH, *supra* note 125.

undemocratic past.¹⁷³ The market should be regulated to the extent necessary to make all the actors pay for their social costs. Such regulation, short from coming only from the public law and from ex-ante government authorization, should be rooted in substantive private law rules accessible to everybody and given bite by a variety of effective remedies. This aspect introduces another crucial aspect of a progressive agenda.

The law in the West is an important aspect of the cultural identity of a community. Europe is in desperate need of such an identity-building exercise, from the perspective of anybody who is interested in providing a viable alternative to the present, unsustainable, pattern of capitalist development and exploitation. Dismantling the social institutions of capitalism, such as access to law for the poor, in favor of the return to a laissez-faire philosophy, in the name of market flexibility, as it consistently happened since the fall of the Cold War, is not a necessity. It is only reactionary politics.

III. SETTING A PROGRESSIVE AGENDA IN EUROPEAN PRIVATE LAW

We shall now try to advance a first step in the outline of a policy agenda for the purpose of developing methodologies and strategies for a progressive model of private law, radically breaking with the present, unchallenged trends in European private law. Despite the fact that one of these authors has actually participated in the drafting of the *Social Justice Manifesto*, we believe that the time is ripe for a thorough break with its moderate, half-way logic. In this light, participation in the drafting of the *Manifesto* back in 2003 should be seen as a “gradualist” strategy, in the sense developed by, among others, Togliatti as early as 1946.¹⁷⁴ The time is now ripe for its frontal challenge. In a moment of unprecedented acceleration, when government-appointed members to the CFR are beginning to give institutional life to what only two years ago seemed only an ill-conceived idea,¹⁷⁵ the construction of the European private law *industry* (symbolized by the European Commission-funded creation of the “network of excellence”) requires radical critique and production of alternatives now, before it is too late.

The setting of a new progressive (or if you prefer Marxist/Socialist) agenda for European private law should start from the full exposure of the

173. See David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT’L L.J. 373 (1991); see also DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 171-76 (2004).

174. See John Bacher, *Eurocommunism: Showing a Human Face to Both Blocs*, PEACE MAG., Feb.-Mar. 1987, at 27, available at <http://www.peacemagazine.org/archive/v03n1p27.htm>.

175. See Mattei, *supra* note 133.

“third ways,” “end of history,” and “new labor” logics that dominate the *Manifesto*, which makes it participate in the “harmonious” logic¹⁷⁶ of construction of the “inevitability” of the current patterns of power disparity, both within the Union and outside of the borders of fortress Europe. By claiming a “social” exception to the neo-liberal logic, and by making the “social” an alternative to the current model of neo-liberal domination, the *Manifesto* blames the current state of affairs on the technocratic way in which Brussels handles the issue. Moreover, it implies some moral superiority of the European model of capitalism as opposed to the U.S. one; an assumption that is entirely unproven and that only serves to hide a higher level of political hypocrisy.

The European political logics of the *Manifesto*, just like the dominant platform of the Democratic Party in the United States, are nothing more than political superstructures in the present phase of global capitalism. These logics cannot be distinguished in moral terms, but should be critically appreciated as political allies in maintaining the economic and social status quo and, for what matters here, the system of private law as a tool of decentralized domination rather than of cultural expression and liberation. This strategy of pointing at the responsibilities of some extremes or exceptions, rather than appreciating those of the dominating middle ground is particularly diffused in the privileged social class of jurists, who thrive in its business of granting principled legitimization to inequality and exploitation.¹⁷⁷

Thus, the current necessity of the legal left¹⁷⁸ to face a line of questions that Pietro Barcellona was posing more than thirty years ago and that need some answers in the current transformative phase of European private law: “In what conditions is it possible to be politically active while remaining jurists? What political change is possible to reach with the tools of the law? What are the legal tools that should be preferred in a perspective of (more or less radical) transformation of society?”¹⁷⁹

These questions point today, even more than thirty years ago, at the political necessity of a dramatic discontinuity in the settled balance of power in the dialectic between private law as an agency of market

176. In the sense discussed by LAURA NADER in *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* 307-08 (1990).

177. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998).

178. For some proposals in need of being transformed into legal praxis, see most recently ROBERTO MANGABEIRA UNGER, *WHAT SHOULD THE LEFT PROPOSE?* (2005). Unfortunately, Unger has given up, in recent years, on the issue of how to transform these proposals into legal action.

179. See PIETRO BARCELLONA, *L'USO ALTERNATIVO DEL DIRITTO: ORTODOSSIA GIURIDICA E PRATICA POLITICA* (1973).

oppression as opposed to an agency of economic and political liberation.¹⁸⁰ Given the present irresponsible and destructive phase of capitalistic accumulation and development, this intellectual break, pointing at progressive alternatives and exploring them in detail, should happen sooner rather than later. This Article should be seen also as a plea to other “resisting” legal scholars and intellectuals to aggregate around a construction of such alternatives based on a political platform alternative to the moderate one of the *Manifesto*. At the moment, the social dimension of European private law is almost an oxymoron, if not an alternative model of hegemony, evoked as an aspiration more than as a political platform by a few concerned scholars. Unfortunately, in the present phase, the social mode of European private law only works as false consciousness, offering a degree of respectability to a field, that of European private law, whose DNA is inherently subservient to the requirements of global capitalism.

A. Re-Politicizing the Process

In an attempt to draft some priorities, a first requirement is that of humility and a sense of a limit. In general, jurists, as such, should not attempt to substitute politicians in making choices impacting the general public, so that a first limit of action—that of political legitimacy, as opposed to professionalism—should be regained. Contrariwise, private lawyers should be aware and defiant of the traditional limits of their own field. Private law is an institutional structure born in Europe out of requirements of early capitalistic accumulation, itself functional to the early imperial transformations of the Roman Republic and Renaissance colonialism. It is possibly the area of law most compromised with, and intimately related to, capitalism so that its anti-capitalistic and counter-hegemonic use is the most problematic. In setting the agenda of a progressive legal and political platform, therefore, private law jurists should stretch their reach to the borders of the traditional subject matter. We need, on the one hand, to reinstate the limits of law as opposed to political action. But on the other hand, we need to bluntly overcome the limits of traditional private law as an agency facilitating accumulation and exploitation to occupy and integrate in the fundamental structure of property rights, which certainly includes contracts and torts—those more progressive areas dealing with the individual welfare and rights of the lower classes as opposed to the exploiting elites. What should be our attitude concerning the ownership, individual or corporate, of the means of production? What limits should we set to economic rights and freedoms? Should we develop a full theory of rights abuse that is able to confront

180. This dialectic is explored in detail in UGO MATTEI & LAURA NADER, *PLUNDER: IMPERIAL USES OF THE RULE OF LAW* (forthcoming 2007).

arguments that fear the possible dictatorship of courts of law? How can we civilize corporate behavior?

While we do not think that the decision on whether to attempt a comprehensive reform of European private law (possibly inspired by values of social justice) and the choice of values informing this reform should belong to professionals, we believe that the legal left should work out detailed proposals on issues such as the ones touched upon in the previous, incomplete list of questions. The decision of whether to change the law is a core business of the political process. But the political process should be put in the position to evaluate technically sustainable alternatives to avoid reproduction of the kind of mistakes that have produced failures of socialist alternatives in a variety of political contexts.

True, in the quite short history of the European Union, most major choices have been carried on by technocrats and imposed over the will of the people. Possibly the creation of a euro zone is the most important of those. Nevertheless, the lack of participation in the adoption of EC legislation that is plaguing Europe and the consequent resistance in the adoption of a European Constitution, imposed from the top down, should not be seized by influential professional guilds (such as that of academic lawyers) to claim privileges and powers that clearly do not belong to them. The spirit of the European people and of the working class majority should be able to emerge in a genuinely popular constitutional effort, in which the wind of socialism might once more blow, if for no other reason than because of the miserable state of affairs produced by current neo-liberal trends. It is the province of progressive jurists to expose the contradictions of democracy double-talk that disempowers the people by the skillful use of ideology.

A master of progressive private law has already suggested the need to appoint a politically responsible body to revise and suggest reforms in the domain of private law, authoritatively developing a suggestion¹⁸¹ that one of us has also hinted to sometime ago.¹⁸² Struggling to obtain such a politically legitimized and responsible body, perhaps on the model of the British Law Commission, looks like an unavoidable pre-requisite to allow the socialist component of European private law culture to impose its alternatives *imperio rationis*. Giving back the political choices to whom they belong, and taking them away from technocrats and self-appointed academics, certainly aids in understanding priorities. Moreover, a legitimate process will prevent that mode of soft influence exercised by corporate actors and will set the next agenda on European private law. One

181. Stefano Rodotà, *Il Codice civile e il processo costituente europeo*, 23 RIVISTA CRITICA DEL DIRITTO PRIVATO 21 (2005).

182. See MATTEI, *supra* note 122.

of the most interesting (and dangerous) ways in which the agenda is set is by transformation of otherwise critical modes of thought (for example independent scholarship on European private law) into organized, quasi-political “industries,” where scholars carry on a political platform, and develop stakes and loyalties to their collective “accomplishment,” abandoning any critical doubt whatsoever.

Martijn Hesselink has been one of the most prominent voices among the moderate scholars of the *Social Justice Manifesto*, advocating for a re-politicization of the process of adoption of a European contract code.¹⁸³ In looking at the past difficulties in implementing private law directives, Hesselink is skeptical of the possibility of adopting a comprehensive Common Frame of Reference by 2009, as the Commission aims to achieve.¹⁸⁴ However, in looking at the example of the Dutch Civil Code adopted in 1992, he suggested that the Commission should submit, similar to the Dutch Commission in the 1950s, a list of questions regarding the substance of the CFR to the European Parliament. This has been one of the possible strategies proposed by scholars to re-politicize the process of Europeanization of private law by making it more public and less technical.

It is true that many of the issues to be faced in the “making” of private law are of a somewhat “technical”¹⁸⁵ nature, so the public understanding of their political implications can be only limited. Nevertheless, it is extraordinarily important for at least the scholarly and legal communities at large to be aware of the fundamental political implications of the different options. This is particularly crucial these days when a large variety of discourses and rhetorical devices are uncritically imported from the United States, either as trendy cultural movements, or as self-serving solutions imposed or marketed by the almighty transnational economic actors together with their faithful servants—the mega-law firms—and, more generally, the mainstream legal community.

But once the political dimension is understood—and the *Manifesto* has certainly been useful from this point of view—the issue of the leftist political agenda is entirely to be faced and, as we hope we have been able to explain, the word “social” might well be more part of the problem than of the solution.

183. Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR. L.J. 675 (2004).

184. Martijn W. Hesselink, *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*, 12 EUR. L.J. 279, 305 (2006).

185. Cf. Duncan Kennedy, *The Political Stakes in “Merely Technical” Issues of Contract Law*, 10 EUR. REV. PRIVATE L. 7 (2002).

B. Toward a Transformative Agenda for European Private Law

European private law has many lessons to learn from the past in order to accomplish the challenges for the future and to be transformed for the purposes of a progressive agenda. To begin with, it is imperative to overcome the great abyss between the common law and the civil law traditions in order to profitably learn from both experiences. Reform should reflect contributions from all the legal traditions of Europe, and we would suggest, also from those non-European traditions that a ripe community of legal scholars well grounded in comparative law, might be understood as useful for the task of legal civilization. This is why, in the domain of European private law, a progressive agenda should make all possible efforts to give a voice to the traditionally recessive legal cultures (the Latin as well as all the new accessions), today plainly ignored or treated with condescendence in all the so-called “integrative” projects of European private law making.¹⁸⁶

European legal scholarship (or science as once was said) should learn to think more freely, should break the still-present cages of formalism, and should challenge the established taxonomies and all the artificial boundaries, like those between private law and public law, or between substantive and procedural law. The task in front of us is to produce a restructured private law system capable of becoming the milestone of twenty-first century social and political regulation of market forces. We are in need of a regulation of market transactions capable of serving the interests of everybody, not only of strong economic actors nor, of course, Europeans only. Such an effort, which is clearly the province of an inclusive leftist agenda, must be started before it is too late.

Many things that traditional formalist (particularly civilian) cages of learning have precluded from being considered as top priorities in private law should be approached and thoroughly explored. Remedies, access to justice, environmental law, protection of diffused interests, fundamental antitrust regulations, and many other connected fields should all be thoroughly explored. The process of socially concerned European law reform is an exercise of learning by doing. It is, however, an exercise that needs to be done within a conscious political plan to accomplish the result.

A minimalist effort should at least locate those fundamental principles that can readily be used by courts to force market actors to internalize the social costs that they produce and transfer on to weaker actors. This is why limiting the focus on contract law, as it is the trend legitimized by the

186. This claim is developed in *OPENING UP EUROPEAN PRIVATE LAW: THE COMMON CORE PROJECT* (Mauro Bussani & Ugo Mattei eds., forthcoming Jan. 2007). For more information, see Von Bar & Swann, *supra* note 60.

Social Justice Manifesto, is both a mistake and a hegemonic strategy to be denounced. The outcome is to shift private law even more openly to the service of global market capitalism.¹⁸⁷

Even seen from the more conservative perspectives of social sciences, and of economics in particular, private law is an integrated body of fundamental rules of the game.¹⁸⁸ Contract, tort, property, restitution, and corporate law, in this perspective, play a very similar role. They integrate and complete each other, as private law rules introducing correct sets of incentives for a marketplace, in which the social costs are appropriately internalized. Variations in form might be substantial. These variations are, however, the result of historical accidents (sometimes promoted as *legal culture*, but that could be described more critically as *survivals* in the sociological tradition or *path dependency* in the economic one) that do not change the fundamental substance of the law.¹⁸⁹ The truth of the matter is that taxonomy in the law must only serve the purpose of organizing knowledge and should never be seen as something determining the substantive solution to social problems. For too many years, European lawyers (again, in the Continent as well as in the common law) have been victims of the illusion that deducing (or inducing) rules from taxonomy could be seen as a scientific exercise. Such a formalistic exercise has not only been a waste of time, but has many times guided ill-considered decisions.

For some years now, a project known as The Common Core of European Private Law has been carried on as a painstaking effort to understand how things *really are* in European private law.¹⁹⁰ The efforts of this group have been conscious of the many difficulties and epistemological objections facing this project. Nevertheless, their experience has been that taxonomy is bound to become a cage if any attempt is made to use it beyond its very minimal (yet so important at the same time) task of organizing materials. As long as the law contains a regime comprehensive enough to force at least internalization of social costs, any taxonomy works. Alternatively, the purest taxonomy will not

187. See Mauro Bussani, *The Contract Law Codification Process in Europe: Policies, Targets and Time Dimensions*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, *supra* note 72, at 159, 159-79.

188. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985).

189. A full fledged critique of the conservative use of the idea of legal culture can be found in Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053 (2001).

190. See Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1997).

contribute anything to legality and legal civilization.

One important lesson that we can learn from social sciences, and from the most advanced approaches to legal scholarship, is the importance of the dynamic process in the production of institutions, as well as of technology and products. The processes, as well as the outcomes, should attract the attention of scholars, judges, and legislators. Most of the externalities and most of the social costs dumped in the backyard of our weaker neighbors in the South of the world *are created during the process of the production* of commodities that are vastly consumed by the almost half-billion people that comprise the European market.¹⁹¹ Such processes of production are traditionally and simply ignored by private law, as these processes are only concerned with the final outcomes. This state of affairs simply shows that European consumers pay too little for their commodities since their prices do not reflect the true social costs of production (environment, labor exploitation, etc.) and European capitalism is once again subsidized by former colonies. Moreover, multi-national corporate logo-lords (mostly European and North American) make unfair profits by pocketing the value of such social costs. In both cases, such economic realities should be a concern for the European policy maker when busy drafting the rules of the game.

It is the duty of a progressive agenda to expose this lack of attention. To be sure, we know that a large number of successful market competitors in the European market offer an inefficiently high number of products at an artificially low price. Such multi-national competitors push smaller market actors out of business. Smaller market actors do not externalize costs of production on people in the South of the world. Usually by acting locally, such weaker actors have to comply with European standards of labor conditions and environmental protection and, as a consequence, cannot supply as many commodities at such low prices. Producers' liability, one of the frontiers in European private law, only covers social costs imposed by the outcome of the productive process in the consumers' market. Indeed, this is a small fraction of the externality problems that a system of private law that approaches problems globally should tackle.

This basic change of perspective—from the outcome to the process—is bound to lead to very important insights, cutting across a significant section of the substantive rules of the game. Such a perspective may, more than anything else, cure the presently existing gaps between substantive rules, remedies, and procedures; a plague that the civilian dogmatic attitude should not infect the European legal process. Focusing on processes as well as outcomes is likely to allow scholars and policy makers (and perhaps

191. For a fascinating discussion of this process of externalization, see NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES (Picador 2000) (1999).

even the people!) to perceive the importance of the stakes that are on the table.

A progressive European private law, for the time being, does not really exist. In fact, such European private law can only stem from an ideological break with the current phase in which Europe is a servant agency of global capitalism. Such a revolutionary break requires an agenda that is capable of spelling out priorities.

Any transformative agenda in European private law should begin with the full disruption of the cages of formalist legal thinking that inhibit the people's appreciation of the full domain of the legal possibility in the process of social transformation and political decisions.¹⁹² More generally, after formalism, the next enemy of a progressive legal system in Europe is professionalism. Professionalism also should be dismissed as the main agency of legal change. In fact, professionalism is by its very nature an elitist phenomenon, which should be subordinate to a democratic political process.

Socially responsible legal change can stem only from the empowerment of the people, thus exploiting the justice motive of the weak and the oppressed. This is why the issue of access to law, which requires a substantial investment of public funds into the judicial process, should be a top priority in our progressive agenda.

Only in a second phase, once the people begin to trust the law again, by fully appreciating its transformative potential, could the task of spelling out the substantive rules of the game be started, perhaps in a first phase along the political compromise of promoting and asserting redistributive and progressive projects within European capitalism. However, one should be aware that the social traits of European capitalism were able to develop only in competition with the Socialist alternative. Today, until the threat of such an alternative becomes credible again, it is much more difficult to overcome and transform the many rules, principles, and ideologies that are biased in favor of profit over people. But departing from the current ideology remains to be done, and it is better for professional disruption of the new European private law industry to happen sooner rather than later.

C. Restructuring the Field: Constitutions and Codes

In 2005, the French and the Dutch rejected the proposed European Constitution.¹⁹³ In the weeks leading up to the vote, left and right political

192. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150-51, 166-72 (1998).

193. See Ratification of the Treaty Establishing a Constitution for Europe, http://europa.eu.int/constitution/referendum_en.htm (last visited Dec. 4, 2006) ("The people of France and the Netherlands rejected the text of the Constitution on 29 May and 1 June

parties strengthened a “No” coalition around two major important claims and obscured other voices in the process, except the one, very popular voice on the right, of racism and xenophobia.¹⁹⁴ While racism has been the independent agenda of the right, no such independent agenda has been produced on the left. The first common claim was that the Constitution would enforce a neo-liberal economic model in the European Union.¹⁹⁵ The second claim was that national governments should not be part of a technocratic Europe whose decisions take precedence over the decisions of

respectively. In the light of these results, the European Council, meeting on 16 and 17 June 2005, considered that ‘*we do not feel that the date initially planned for a report on ratification of the Treaty, 1 November 2006, is still tenable, since those countries which have not yet ratified the Treaty will be unable to furnish a clear reply before mid-2007.*’” (quoting Press Release, Luxembourg Presidency of the Council of the European Union, Jean-Claude Juncker States that There Will Be a Period for Reflection and Discussion but the Process to Ratify the Constitutional Treaty Will Continue with No Renegotiation (June 17, 2005), <http://www.eu2005.lu/en/actualites/communiqués/2005/06/16jclj-ratif/index.html>) (emphasis added)).

194. See Jürgen Habermas, *Le non illusoire de la gauche*, NOUVEL OBSERVATEUR, May 5, 2005.

La capacité de régulation de l’Etat-nation ne suffit plus depuis longtemps à faire pièce aux conséquences ambivalentes de la mondialisation économique. Ce qui est célébré aujourd’hui comme « modèle social européen » ne peut être défendu que si, dans le cadre même de l’Europe, la politique est capable de revenir à la hauteur des marchés. Ce n’est qu’au niveau européen que l’on pourra récupérer tout ou partie de la capacité de régulation politique de toute façon perdue au niveau de l’Etat-nation. Les membres de l’UE renforcent aujourd’hui leur coopération dans les domaines qui relèvent de la politique de sécurité – la justice, le droit pénal et l’immigration. Une gauche active et lucide dans sa politique européenne aurait déjà depuis longtemps incité à une harmonisation beaucoup plus poussée, y compris dans les domaines de la politique économique et fiscale.

Id. (“The regulatory capacity of nation states is no longer effective due to the ambivalent consequences of globalization. Today the well-known ‘European social model’ can only be defended if European politics achieve the same level of integration of European markets. Only at the European level could we get back, in part or fully, the political regulatory capacity that was lost at the state level. Today EU Member States are strengthening their cooperation within national security—justice, criminal law, and immigration. However, for a while, an active and lucid left on European politics has asked for a harmonization policy much more radical and complete on tax and economic policies.” (translated by authors)).

195. See Bernard Cassen, *ATTAC Against the Treaty*, 33 NEW LEFT REV. 27, 27-28 (2005), available at <http://www.newleftreview.net/?issue=267> (follow “Bernard Cassen, ATTAC Against the Treaty” hyperlink). “The collective appropriation of the treaty also had the effect of ‘naturalizing’ the European question, long considered beyond the scope of national politics. For the first time, the link has been made between neo-liberal policies formulated at EU level and those pursued ‘at home.’” *Id.*

democratically elected national legislatures.¹⁹⁶ The fundamental paradox that has characterized the constitutional process in Europe might well close the issue of legitimate private law, forcing it into a conundrum. On the one hand, a progressive transformation of private law requires its recognition as a fundamental constitutional choice at the European level; but at the same time, many progressive visions resist major transformations of European private law in fear of capitalistic hegemony. On the other hand, the mainstream conservative forces, those attempting to avoid the encounter between private law and the political process, are the ones more active in pursuing ambitious transformations of the private law system. It is difficult to emerge from this conundrum, and progressive legal theory is at risk of suffocation.¹⁹⁷

In the aftermath of the demise of the European Constitutional Treaty, the European Union is experiencing a contradictory process, which can be looked upon from a global perspective. On the one hand, the European Union is now the institutional structure of a market for some half-billion people, with a larger GDP than the United States,¹⁹⁸ experiencing a continuous process of integration from the legal and economic perspectives. On the other hand, divisions and rivalry between the most important Member States, the lack of effective political processes and policymaking, as well as visionary euro-friendly platforms on the left, have strengthened the notion of a persisting democratic deficit while weakening the institutional imagination of technocrats, jurists, and scholars. The outcome of this contradictory process has created a new skepticism and weakened political Europe, which is increasingly becoming a periphery of the corporate-dominated world, while increasingly dominated by U.S. legal scholarship in a variety of legal domains.¹⁹⁹

196. See *id.* at 28; Jan-Werner Müller, *After the Double No: The EU's Best Hope*, BOSTON REV., Nov.-Dec. 2005, at 25-28 available at <http://bostonreview.net/BR30.6/mueller.html> (describing this claim in the context of a technocratic Europe).

197. See Kennedy, *supra* note 137, at 674-78 (explaining that a third globalization of legal thought is characterized by a new legal consciousness, which speaks the language of rights and neo-formalism as well as that of balancing conflicting policy values).

198. Compare CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), <http://www.cia.gov/cia/publications/factbook/index.html> (select "European Union" from drop-down menu) (estimating the European Union's "official exchange rate" GDP at \$13.31 trillion during 2005), with CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), <http://www.cia.gov/cia/publications/factbook/index.html> (select "United States" from drop-down menu) (estimating the United States' "official exchange rate" GDP at \$12.49 trillion during 2005).

199. See Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (reviewing THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920 (Mathias Reimann ed., 1993) and DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN

In this scenario, it is hard to believe that the creation of a socially responsible European private law can be perceived as a top priority, when such fundamental issues such as a common defense, common foreign policy, common immigration policy, or comparable standards in education and social protection, are neither solved nor discussed openly. Nevertheless, the observation that there are more important questions to tackle should not discourage action in the domain of private law. On the contrary, private law in Europe must perform as a constitutional, societal space where individuals and groups interact and are bound by private agreements or publicly enforced constraints, thus developing a genuine legal and social identity.²⁰⁰

True, as it is well known, the system of private law adjudication, as traditionally conceived, has neither the sword nor the purse; the former being the province of remedies and enforcement, and the latter that of public law. Nevertheless, it is exactly a restructuring of the field of private law that the left should pursue in order to make the law serve the interests of the working class—the traditional loser in social processes—rather than those of the strong corporate interests and of the elite. Within the traditional conception of the field of private law, it would be unfair to burden the shoulders only of European private law with the task of radical redistribution of resources, which is the real issue that should be put on the table today. But things are different when the political spaces of private law are restructured. To put it simply, seen from a genuine leftist agenda, one of the big hurdles in the creation of a more socially civilized Europe is that the rich have too many resources—used in part to condition the political process—and the poor too few. Moreover, on average, each Northern and Western European has too many resources, if compared to his Southern and Eastern fellows; and each European in general has too much if compared to those that are maintained, by violent means, outside of the walls of our shameful fortress.

This state of affairs, due to the historical path of capitalistic accumulation, has been very poorly resisted by the working class because the bourgeois hegemony has artificially divided the losers of the political processes, setting the ones against the others in fear of being demoted in their capacity as consumers. (An icon of this state of affairs has been the fear of the Polish plumber.) From a socialist perspective, that should remain embedded in internationalism, these global inequalities cannot be justified, and any legal system can be considered legitimate only as long as

DEUTSCHLAND (Marcus Lutter et al. eds., 1993)).

200. See Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 71, 71-87 (Karl-Heinz Ladeur ed., 2004).

it serves a purpose of progressively diminishing them. Unfortunately, internal as well as international distributional questions can only be partly tackled by means of the official (state or European Union) production of public law, given the current structure of international relations and the current mainstream agenda in international financial institutions controlling the flux of capital. Nevertheless, what is not directly possible by official legislation might be incrementally reached by restructuring private law—the backbone of decentralized economic transactions.

Because private law can be considered as a sort of economic constitution, there are a few points that should be remarked on and fully considered in the scholarly path towards its restructuring. To begin with, private law is one of the fundamental domains in which the problems of externalities arise. It is the very basic legal structure of the market that issues of environmental harm²⁰¹ and labor standards (just to talk about two of the most socially loaded areas of the law) get into the private law regime for a proper venue of discussion. A system of private law that does not approach, in its fundamental philosophy, the political choices that are mandated today by such important areas of externality production, simply fails in its basic role to provide a proper legal regime for a sustainable market. This is an area in which leftist scholarship should not find too many difficulties in setting alliances with approaches more ready to accept capitalism as the fundamental economic constitution of Europe. It might be more difficult to find common platforms in areas such as the division of profit between capital and labor, but even here, examples of progressive law to look to as models should not be too difficult to find. Job security, limits to the length of the workday, maternity and paternity leaves, all the way to enterprise congestion and profit sharing have been experienced here and there in the past,²⁰² and should today be restated, updated, and proposed as viable alternatives to uncivilized exploitation. Much of this can be accomplished even by way of interpretation of the existing arsenal of anti-externalities private law remedies. To do so, however, private law must be given a chance by incorporating the appropriate institutional apparatus into its very structure. An apparatus that, from the left, could be used to give a real meaning to the idea that private property rights can be tolerated only as far as they can demonstrate a degree of social utility by

201. For a first step in this direction, see Gerrit Betlem, *Environmental Liability and the Private Enforcement of Community Law*, in *TOWARDS A EUROPEAN CIVIL CODE*, *supra* note 133, at 677, 677-96, arguing for an insertion of this area of the law into the Code.

202. For example, in former Yugoslavia under the leadership of Tito, before Western exploitation and imperialism had turned the Balkans into bloodshed, see GIANNANTONIO BENACCHIO, *LA PROPRIETÀ NELL'IMPRESA AUTOGESTITA JUGOSLAVA* (1988).

providing a broad redistribution of income and by sustaining fundamental human needs. (Think about landlord and tenant law.)

Historical experience shows that in order to produce a break with dominant trends that is capable of recreating conditions of fairness, there is the need for a strong community of legal scholars willing to explore new avenues of inquiry and capable of translating notions—such as those of equality and human dignity, always offended by capitalistic exploitation—into rules of private law notions. There is the need for a political will, able to inject into the law a degree of political legitimacy and a self-critical philosophy, capable of understanding the current global ideology and departing from it. Finally, there is the need of a recognizable political function in the landscape of the sources of law. We find such visible political inspiration and symbolic power in all the great codifications, from the French, to the German, to the Italian, to the Mexican, to the DDR of 1975—just to offer the most visible examples. Most importantly, a reform of private law—with its inevitable aspects of innovation, breaks with past, and revolt against a previous order—inherently reflects a desire of progress, a move away from a status quo that is perceived as non-desirable, perhaps also technically, but certainly politically and ideologically.

Here are some examples. In 1804, France was trying to move beyond the class privileges of the *ancien regime*. In 1900, Germany was attempting a new start as a mighty unitary empire, away from political divisions and warfare. In 1942, Italy was reacting against the bourgeois and liberal legal order. A similar social revolt, though grounded in a socialist rather than in a fascist philosophy, characterized 1950 Mexico. The DDR produced, in 1975, an advanced and innovative Civil Code in an attempt to overcome bourgeois formalism, professionalism, and faked economic equality.

Such a need for political inspiration, to be sure, does not necessarily mean that there is a need or a desire of an autocratic political rule, such as that in place in most of the previous examples. Such inspiration could well come from the bottom up, as a cultural legacy of an intellectual community of critical thinkers worth their salt and not capable of being transformed in yet another ideological industry serving the dominant rhetoric. This global community needs to be established. If this is the case, then a political platform capable of inspiring a “not merely technical”²⁰³ system of private law can be inducted from the historical moment that a social community is living, from the tensions and the stakes of such a moment, as reflected by constitution-making exercises that might, and indeed do, appear under new clothes in the present post-modern condition. In particular, political inspiration and critical self-reflection can be induced in comparison with other experiences, from a desire of identity of the European community in

203. See Kennedy, *supra* note 185.

the post Cold War international order.

It would seem natural to seek such guidelines in a project with the symbolic power such as the one represented by a constitution.²⁰⁴ Unfortunately, as already mentioned, the European constitutional process carried on by the Convention and its presidium has been nothing more than a major failure, the product of a political oligarchy, lacking democratic legitimacy, and promoting the current neo-liberal order to constitutional status. It misused the label "Constitution" for something that was little more than the charter of an "old boys club," seeking, in a mythological European past, legitimization for the privileges of the present ruling elites, while letting out the others.²⁰⁵ Unfortunately colonialism, racism, and authoritarianism show that the European past (and present) is less than commendable and the present attitude towards anybody born outside of the walls of fortress-Europe make the future too dark to be inspirational for someone seeking values for a "real" constitution.

Despite these serious problems, the European charter of rights would have offered a political mandate for a reform of private law governing the common market. The welfarist nature of European capitalism, despite the refusal of some of the most classic ideas—such as the social function of property rights—is re-asserted in the charter and is claimed as a strong aspect of European identity.²⁰⁶ It might be expanded towards its socialist potentials. Both the political aspiration, and the previous path that reform must attempt to interrupt, are therefore a given. The community of progressive legal scholars should interpret, apply, and put into practice such political aspirations and self-criticisms in the next years of the making of European private law by setting a proper agenda. As enlightened as a scholarly community might be, (and we might doubt that the current European private law community is one, effectively normalized by its

204. See PIERRE BOURDIEU, *Social Space and Symbolic Power*, in *IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 135 (Matthew Adamson trans., 1990) ("In the symbolic struggle for the production of common sense or, more precisely, for a monopoly over legitimate naming, agents put into action the symbolic capital that they have acquired in previous struggles and which can be juridically guaranteed.").

205. See, for instance, the non-voice of the "new member states" during the constitutional process. The former Eastern European countries were, in fact, given only an observer role without any political power. *Economic and Monetary Policy Cooperation Between the EU and the Acceding Countries Following the Signature of the Accession Treaty*, DEUTSCHE BUNDESBANK, July 2003 (Monthly Report), at 15-16, available at http://www.bundesbank.de/download/volkswirtschaft/mba/2003/200307_en_economic.pdf.

206. European social capitalism is well described as an alternative both to socialism and to neo-liberalism by ALBERT, *supra* note 162. A somewhat more idealized, though highly accessible description is written by RIFKIN, *supra* note 163.

transformation into an industry) we should not fall into the romantic *Savignian* idea (or ideology) that legal scholars are the only interpreters of the “spirit of the people.” The people themselves should be empowered to talk about the law in order to make their sense of justice (or of injustice). This is why we now have to turn to an area—that of access to law—that should become an integral part of a restructured progressive notion of European private law.²⁰⁷

D. Restructuring the Field: Whose Access to Justice?

Access to justice empowers individuals in society. If it grants a bite to the private law system, it may allow at least a minimum check by the people on the current decline of legal civilization. This is why it should be a top priority of a leftist agenda. The smartest legal professional cannot understand the law and see its decline as deeply as someone suffering due to its injustice. In “face to faceless societies,” such as the capitalistic ones, where someone whose rights are violated by a bank or a telecom can only complain to an answering machine or to a disempowered human being, who is exploited in some call center, access to law is largely reserved to the haves. Have-nots are excluded by a system of courts in which enforcement of rights is progressively more expensive and privatized.²⁰⁸

The consequence of this state of affairs is the separation of legal scholars from the real life of the law. With no access to justice, the law lacks a soul. It is not a living social creature but it is reduced to a technocratic laboratory of “social engineering.” With no people’s control of the law, legal civilization is bound to decline. Individuals get disengaged and are transformed into passive spectators of the “spectacle.” The civic sense and the social participation in a process of civilization are substituted by a brutish appetite for materialistic consumption. Violated rights, such as those of airline travelers, can be cheaply bought by corporations offering compensation with a few frequent flier miles.

Currently, Western legal civilization is in disarray, most importantly because of the attitude towards it by the world economic power. European legal culture should not participate in downgrading the rule of law into a pale rhetoric, with access to justice only possible through entrepreneurial plaintiffs’ lawyers making out from a selected sample of the disgraces suffered by the many victims of predatory capitalism. With no access to justice, the “invisible hand” of legal and economic integration works against the common interest, favoring, to the contrary, rent-seeking

207. The classic example of this idea is authored by LAURA NADER in *THE LIFE OF THE LAW* (2002).

208. See Laura Nader, *Alternatives to the American Judicial System*, in *NO ACCESS TO LAW: ALTERNATIVES TO THE U.S. JUDICIAL SYSTEM* 3, 3-5 (Laura Nader ed., 1980).

attitudes of capitalistic predators. Much of today's discussions about European private law do not come to terms with the grim reality of an almost complete disjunction between the law in the books and what happens in practice.

European private law is a young field of inquiry, whose early contributions date back to the late 1980s, thus developed in temporal connection with the dismantling of social welfare institutions beginning under EU policies at the conclusion of the Cold War. True, some early work was done by a few pioneers, but European private law, as a field and an industry, is all historically subsequent to the Reagan-Thatcher revolution. This is perhaps no coincidence. The exciting perspective of building a new field could distract legal scholars from the devastation of the very idea of legality and rights produced by that reactionary political platform. Paradoxically, the revolutionary transformation produced by post 1989 neo-liberal triumph was vandalizing legality in countries such as the United Kingdom and the United States, who are both much admired abroad for their legal systems. Any social platform in European law today should start from a full consciousness of the devastating effect of neo-liberalism on legality, and should first attempt a counter-revolution aimed at making good for the damage done. In this light, central to a socially concerned platform, much before the need to change a few black letters in our codes, should be the issue of access to justice.

The issue of access to justice is particularly instructive from our perspective. In researching the field,²⁰⁹ we noticed that a first intensive wave of writing on the field shortly preceded the so-called Reagan-Thatcher revolution, the moment in which public institutions started being transformed and significantly privatized. Cappelletti's famous collective project,²¹⁰ in particular, witnessed a moment of general optimism for the public interest model, an idea of activist, re-distributive, democratizing, public-service minded approach to the public sector in general, and to private law in particular. In that intellectual mode of thought, the Welfare State in Western societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare, and education to the needy. True, in the same years, Laura Nader's work was already skeptical of the possibility of providing access to law to the people

209. One of the authors is also the General Reporter for the "Access to Justice" project of the International Academy of Comparative Law Conference which took place in July 2006 in Utrecht. See XVIIth Congress of the International Academy of Comparative Law, <http://www2.law.uu.nl/priv/AIDC/index1.asp> (last visited Dec. 4, 2006).

210. See ACCESS TO JUSTICE AND THE WELFARE STATE (Mauro Cappelletti et al. eds., 1981).

in faceless industrial societies, and prophetically suspicious towards the rise of the ADR industry, but it was still motivated by a sincere belief in the possibility of bringing justice to the people.²¹¹

Beginning in the early 1980s, the global ideological picture changed. Neo-liberal policies, inaugurated by Prime Minister Thatcher in Great Britain, the crib of the Welfare State, and imported on a much weaker institutional background in Reagan's America, were based on the very basic assumption that the Welfare State was simply too expensive. A Western capitalist model, busy to outspend the Soviet Block in order to win the Cold War, had to save resources by privatizing as much of its welfare services as possible. Public shelters, health, education, and justice for the poor were the natural "victims" of such cut-backs. By the end of the 1980s, with the "successful" outcome of the Cold War, this policy of "privatization" had overcome the boundaries of the Anglo-American world, as well as those of the traditional political right. At the "end of history," redistributive practices, both direct and indirect, could not be structurally afforded in the domains of shelter and health, let alone the survival of those secondary in importance, of education and justice.

With no desire to invest money in legal aid and programs for access to courts for the poor, with a quite sustained cultural crusade against the welfare state and its policies, the future of access to justice, in the original sense of granting equal opportunities to litigation for the rich and the poor, seemed quite grim. Some countries simply stopped worrying about the unsatisfactory state of their systems of access to justice, while others, where the system was more advanced, were undermining its legitimacy by working out even more privatized and justice-remote models of dispute resolution. The birth of the ADR industry, and the development of a professional class of mediators, not necessarily trained in the law, who served the interests of harmony and non-adversary social control, had transformed *the issue of access to courts of law for everybody* into that of *limiting such access as much as possible*, by creating an alternative not based on adversary justice, but on harmony and governmentality,²¹² and most importantly, quite entirely privatized. These general transformations of Western law, involving a variety of aspects of the legal system, including the rehabilitative ideal (itself expensive) in criminal law, and more generally the target of pursuing social justice through law, have been exported worldwide, incorporated in Structural Adjustment Programs and

211. See NADER, *supra* note 207 (containing Nader's intellectual itinerary and bibliography).

212. In the sense of the famous College de France lectures of M. Foucault. See MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE 1975-1976 (Arnold I. Davidson ed., David Macey trans., Picador 2003).

other vehicles of diffusion of “global” legal thinking.²¹³

Only in very recent times, some scholars became aware of the fact that in the years of the demise of the Welfare State, access to justice was transformed into a non-issue (as witnessed by the disappearance of all the scholarly literature) substituted by a quite opposite and almost certainly “invented” problem, that of “litigation explosion.”²¹⁴ Accordingly, the solution to the flood of litigation was closing the doors of adversary justice for everybody, in particular for the weaker market actors and the development of a new “industry,” that of ADR, governed by the ideology of harmony and social peace. To be sure, closing the doors of justice for the non-wealthy constitutes a further empowerment of the strong economic actors. Because there is no legal venue relatively open to the average individual, powerful market actors are free to avoid the social consequences of their actions. With no desire to invest money in law as a public good, what follows is lawlessness and bullying of the strong over the weak. Consequently, after a legitimized process of law reform, it is access to justice that claims a role of top priority for any agenda aimed at social justice through the law.

Access to justice is today intimately connected to the idea of consumer rights, itself central, as we have seen, to the cultural DNA of European private law. It was not by chance that in the previous sections of this Article, we have discussed the ideological stakes in unfair consumer contractual terms.²¹⁵ Nevertheless, there is a point that needs to be clarified. A progressive private law agenda can by no means be satisfied, even by a fully satisfactory level of consumer satisfaction, guaranteed by some cheap and easily accessible remedial venue. Consumerism has characterized and still characterizes much of the institutional evolution of European private law, and many leftist scholars have perceived it as a progressive platform. Consumerism, nevertheless, is a foe of the progressive agenda of post-capitalistic transformation of society, performing as a trap, in which, unfortunately, some of the best and more generous intellects of leftist legal scholars have fallen. Consumerism only sets a more advanced frontier of global capitalism, making its unsustainable model of development softer, more user-friendly, and ultimately more resistant to radical change.

One should be aware that the e-transformation of citizens and individuals into consumers is, to be sure, one of the most dangerous

213. See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1088&context=gj> (discussing this evolution).

214. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993).

215. See *supra* Part I.C.

cultural transformations produced by post-modern capitalism. It destroys class consciousness, and disempowers the resisting potential of the proletariat by transforming even the free time of the working class into non-compensated work, in which alienated workers, transformed into consumers of useless commodities, relentlessly shop around for better deals, invariably favoring the corporate power.²¹⁶ When we point at access to justice as one of the most important areas that should be explored in order to restructure the field of private law, we do not wish to fall into this trap. Corporations are all favorable to cheap venues where consumers can exchange their less than satisfactory merchandise, and are even available to bribe the few who still have the energy to protest by offering them some material compensation. This allows standards of production to remain low, with further exploitation of unskilled proletariat in sweat shops and lowers the risk of the rise of actual social responsibility. It is sufficient to see the long lines of consumers in the exchange departments of the major American chains of consumer goods distribution. These people are made happy by a mere substitution of a defective product with a working one, with no one compensating them for the extra time and expenses arising from the need to return and change a product for which they paid, perhaps hundreds of dollars, and which was bought by the retailer in the South of the world for a few cents.

Should the left care for this kind of access to justice? Should obtaining easy ADR venues for slightly more complicated issues than exchanging a poorly working CD player be something worth struggling for? The answer is emphatically no. To the contrary, the kind of justice that we need to guarantee is the genuinely redistributive one, in which ill-gotten profits are disgorged and in which the people lucky enough to be born within the walls of fortress Europe also vindicate, in the public interest, the rights of their less fortunate fellows on whose suffering and degradation the current pattern of capitalist development is based. What we should care about is the sense of justice of civic individuals concerned for their brothers, not that of brutish individualistic consumers. This kind of access to justice is worth struggling for, within a broad conception of private law aimed at offering the institutional framework of a civilized pattern of global exchanges.

216. This image—of the consumer as someone working without knowing that he is doing so—was introduced for the first time by French sociologist Baudrillard. See Jean Baudrillard, *Consumer Society*, in JEAN BAUDRILLARD: SELECTED WRITINGS 29, 29-56 (Mark Poster ed. & trans., 1988).

E. Diversity and Distribution: Why Should We Care?

Not only should the left attempt to restructure the field of private law by making it comprehensive of issues of inclusion and social transformation that traditionally are beyond its scope, but it should also be aware of some of the most important observations thus far available. The most important lessons in economic sociology in the realm of European contract law came from Gunther Teubner's study on the harmonization process, which began with the Unfair Terms Directive transposed in different territories of the EU.²¹⁷ According to Teubner, the harmonization of contract law, rather than unifying, has irritated domestic legal regimes, thus creating deeper cleavages among different legal systems. In taking this lesson seriously, one might be tempted to conclude that harmonization or private law rules are *per se* a self-defeating strategy, so that no political agenda can be accomplished by this tool. While Teubner is an atheist with regard to harmonization, he clearly shows that the effects of harmonization in different socio-economic contexts produce more diversity rather than unity. Therefore any welfarist provision, hard code, or any private law directive will have different effects as well as a different impact in terms of creating costs or benefits for different groups. It should thus be appreciated in context, with a clear vision of *who are the winners and who the losers* of the social processes it has produced in order to take the side in favor of the latter. In other words, a progressive platform in European private law should operate a distributional analysis and always take the side for the weak.

Another important lesson from Teubner's work is that the evaluation of the economic and social impact of harmonized private law rules in the European Union is a job not only for economists, but also for lawyers. Such perspective resonates in the works of United States private law scholar, Robert Hale who demonstrated in the 1920s how a choice between two different private law rules, including whether a judge or a legislator makes it, entails a new distribution of bargaining power among private individuals.²¹⁸ Thus, in addressing the impact of harmonization on private law, progressive lawyers ought to clarify how each particular rule expresses a choice that shapes the bargaining power of the parties directly and

217. See Teubner, *supra* note 101, and more recently, Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT'L L.J. 517 (2006).

218. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627-28 (1943) ("Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others. It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining.").

indirectly involved in the dispute.²¹⁹

However, the diversity triggered by the implementation of European directives is becoming a dramatic one because those who will have to bear the highest costs of its dreadful consequences often happen to be consumers rather than producers, the Southern or the new Member States rather than the old core of Member States and the immigrants rather than the EU citizens. Take, for example, the product liability saga triggered by the Directive. In *González*,²²⁰ *Bilka Lavprisvarehus A/S*²²¹ and recently in the theatrical repetition of the saga *Commission v. France*,²²² the ECJ proved its authority, by finally imposing, through a penalty, its interpretation of the Directive, after more than twenty years of French resistance.²²³ The ECJ non-consumer-friendly interpretation of the Product Liability Directive, often following the Commission view on the matter, has dramatically changed domestic tort rules and their distributional impact not just in France, but also in Spain and Denmark, who are directly involved in the issue, and also throughout Europe. These ECJ cases demonstrate that the regulation of defective products aims to respond to severe personal injuries and health risks for consumers. Thus, in evaluating injuries, risks, and allocation of costs through tort law, judges ought to acknowledge the variety of domestic private law regimes—including not only tort but also contract and property rules—as well as the highly diverse national health care systems and pharmaceutical regulations.²²⁴

In adopting a distributive analysis to inform their decision, progressive jurists should make two preliminary considerations. First, all the above legal factors are crucial because they constitute the background

219. See Kennedy, *supra* note 185.

220. Case C-183/00, *Maria Victoria González Sánchez v. Medicina Asturiana SA*, 2002 E.C.R. I-3901, para. 25; Case C-52/00, *Comm'n v. France*, 2002 E.C.R. I-3827, para. 16; Case C-154/00, *Comm'n v. Greece*, 2002 E.C.R. I-3879, para. 12 (each contemporaneously finding that "the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself").

221. See Case C-402/03, *Skov Æg v. Bilka Lavprisvarehus A/S & Bilka Lavprisvarehus A/S v. Mikkelsen*, 2006 E.C.R. I-199, para. 37-39.

222. See Case C-177/04, *Comm'n v. France*, 2006 E.C.R. I-2461.

223. See Caruso, *supra* note 43, at 751-52.

224. See Marie-Eve Arbour, *Compensation for Damage Caused by Defective Drugs: European Private Law Between Safety Requirements and Free-Market Values*, 10 EUR. L.J. 87 (2004); André Sapir, *Globalisation and the Reform of European Social Models 1-2* (Sept. 9, 2005) (unpublished manuscript prepared for a presentation to the European Union's Finance Ministers and Central Bank Governors at the ECOFIN meeting), available at <http://www.bruegel.org> (follow "Publications" hyperlink; then follow "Papers" hyperlink; then follow "Globalisation and the Reform of European Social Models" hyperlink).

rules, which are closely interrelated to domestic tort law regimes. These background rules shape the bargaining power of the parties involved in the dispute and they have an impact in determining winners and losers in the choice between alternative liability rules.

Second, because of the great variety of background rules in the EU—due to the multiplicity of welfare systems as well as private law regimes—the decision to change a liability rule in the name of European uniformity will also increase the unequal redistribution of resources among Member States, thus creating greater diversity and deeper social cleavages rather than better harmonization in the internal market.²²⁵

For instance, changing a liability rule in Spain or in Greece, where there is a universal or national healthcare system, is radically different than changing a liability rule in continental or Anglo-Saxon Member States, in which consumers buy private health insurance, sometimes subsidized by the state. By restricting the protection afforded to consumers by domestic tort rules, European judges have increased inequalities among fellow Europeans. In fact, injured parties situated in Mediterranean countries will find it more difficult to recover than those situated in continental or Anglo-Saxon countries. The latter group of consumers could sue an insurer for health related injuries under contract law rather than tort law. Thus, when the ECJ imposes uniformity on a market that is still divided by social and cultural barriers, which are not necessarily undesirable from a distributive standpoint, it creates new inequalities among European individuals.

By adopting a distributive analysis, when jurists choose between two alternative private laws, they have to openly acknowledge and offer to political discussion the costs and the benefits of their decisions for the parties directly and non-directly involved in the dispute. In realizing the effects they are producing, they might suggest softening the need for uniformity or maximal harmonization in European private law. If they decide to continue striving for uniformity, rather than justifying their choices through textualist interpretations or arguments, which entail separation of powers and supremacy of Community law, they should openly acknowledge the winners and the losers of the decision to unify a given area. In our case, Spanish medical businesses and Danish distributors clearly won at the expense of national consumers.

To be sure, in acknowledging the costs and benefits stemming from a liability rule, a distributive analysis requires an inquiry into the facts and a thick knowledge of the legal and socio-economic regimes in which the dispute takes place. True, substantive information is available in scholarly works and studies conducted by the European Commission on the varieties of welfare regimes and different product liability systems within the

225. This point was first made by Gunther Teubner, *supra* note 101.

Member States.²²⁶ If we do not trust such information that might be biased or distorted by the “industry,” then we should pay greater attention and debate more openly the role of courts for carrying out a distributive analysis and openly acknowledging their political choices in their decision impacting the local context.

CONCLUSION

In this Article, we have surveyed the current debates creating sparks in European private law scholarship and deep dissents among European lawyers. We have explained why the notion of a social private law holds no clarifying meaning and thus remains ambiguous and open to controversies. We also have claimed that a notion of Social Europe is a controversial one, due to the pluralities of welfare regimes as well as the alternative hegemonic project that Europe represents today for global markets.

Our claim is that today in Europe, as in the past, the “Social” in private law does not necessarily fulfill the needs of a progressive, let alone, socialist agenda. Instead, in coalescing under the rubric of the “Social,” scholars have compromised over important issues that should be reconsidered because giving a human face to capitalist exploitation cannot be seen as a progressive agenda.

We also have highlighted some of the main problems and offered methodological alternatives as well as a policy proposal for what we called a transformative agenda for a European private law. Our claim is that any project for European private law should go beyond coalitions around social justice. Instead, it should restructure the field of private law by creating strategic alliances on specific targets (access to justice, distributive outcomes, empowerment of labor) linking scholarly, political, and judicial forces in the construction of a progressive agenda capable of serving the interests of the multitudes and of serving human civilization.

226. See *Report from the Commission on the Application of the Directive 85/374 on Liability for Defective Products*, COM (2000) 893 final (Jan. 31, 2001); PAULETTE KURZER, *MARKETS AND MORAL REGULATION: CULTURAL CHANGE IN THE EUROPEAN UNION* (2001).
